185

(1)

Supreme Court, U.S.
FILED

10 13 13 APR 20 2011

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

JOHN R. CLELLAN,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth District and the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

JOAN KATHLEEN CLELLAN
Counsel of Record
P. O. Box 492
Galloway, Ohio 43119
(614) 561-8657
E-MAIL: jim.dandy60@yahoo.com

Counsel for Petitioner

April 19, 2011

QUESTIONS PRESENTED FOR REVIEW

I. Where an appellate court reviews an application for Reopening an Appeal based upon a claim of ineffective assistance of appellate counsel, may that court find failure to preserve and produce applicant's requested dash camera video-taped "confession" after arrest and position of attacker's car in road, potentially useful evidence and not materially exculpatory when such decision conflicts with established appellate case law?

II. Where an appellate court denies an application for Reopening an Appeal, as above-stated, may that court find failure to produce in discovery a deputy's statement presented second day of trial and entered into evidence by trial judge without defense counsel's objection, not prejudicial to Petitioner or to the outcome of his case, without examination of that officer's statement and reliance on the transcribed description of such evidence alone?

III. Where a "test case" for the "Castle Doctrine" is presented to a jury along with an improper proposed jury instruction regarding Ohio Revised Code Section 2901.05 that was further improperly modified by the trial court, may the reviewing court find that such jury instructions did not deprive Petitioner of a fair trial and due process rights?

IV. Where an attacker had admitted to a 911

dispatcher that he went up to Petitioner who was lawfully in his own vehicle and began threatening Petitioner, may the appellate court, both on Appeal and on Application for Reopening, rely on its own interpretation of what "in the process" entails, adding burdens upon the Petitioner not set forth in the statute?

V. Should the Ohio Supreme Court have declined jurisdiction to hear a "test case"under the "Castle Doctrine" which, as interpreted by both trial and appellate courts, denies Petitioner the inalienable constitutional right of self defense as set forth in recent decisions of the Supreme Court of the United States?

VI. Where Petitioner and his co-defendant were tried together both claiming self defense and/or defense of another pursuant to the "Castle Doctrine," was there unequal protection of Petitioner whose co-defendant coming to his rescue was found not guilty and should the Ohio Supreme Court have declined jurisdiction to hear this matter?

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i & ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES CITED vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... viii & 2

STATEMENT OF THE CASE 4

I. Mr. Clellan's Trial 4

II. State Court Appeals 7

REASONS FOR GRANTING THE WRIT 8

First Question Presented:

I. Where an appellate court reviews an application for Reopening an Appeal based upon a claim of ineffective assistance of appellate counsel, that court may not find failure to preserve and produce applicant's requested dash camera video-taped "confession' after arrest and position of attacker's car in road, potentially useful evidence and not materially exculpatory when such decision conflicts with established appellate

case law.....8

Second Question Presented:

II. Where an appellate court denies an application for Reopening an Appeal, as above-stated, that court may not find failure to produce in discovery a deputy's statement presented second day of trial and entered into evidence by trial judge without defense counsel's objection, not prejudicial to Petitioner or to the outcome of his case, without examination of that officer's statement and reliance on the transcribed description of such evidence alone.....12

Third Question Presented:

III. Where a "test case" for the "Castle Doctrine" is presented to a jury along with an improper proposed jury instruction regarding Ohio Revised Code Section 2901.05 that was further improperly modified by the trial court, the reviewing court may not find that such jury i nstructions did not deprive Petitioner of a fair trial and due process rights.....17

Fourth Question Presented:

IV. Where an attacker had admitted to a 911 dispatcher that he went up to Petitioner who was lawfully in his own vehicle and began threatening Petitioner, the appellate court may not, both on Appeal and on Application for Reopening, rely on its own interpretation of what

"in the process" entails under Ohio Revised Code Section 2901.05, adding burdens upon the Petitioner not set forth in the statute.....22

Fifth Question Presented:

V. The Ohio Supreme Court ought not to have declined jurisdiction to hear a test case under the "Castle Doctrine" which, as interpreted by both trial and appellate courts, denies Petitioner the inalienable constitutional right of self defense as set forth in recent decisions of the Supreme Court of the United States.....27

Sixth Question Presented:

VI. Where Petitioner and his co-defendant were tried together both claiming self defense and /or defense of another pursuant to the "Castle Doctrine," there was unequal protection of Petitioner whose co-defendant coming to his rescue was found not guilty and the Ohio Supreme Court should not have declined jurisdiction to hear this matter.....28

CONCLUSION 29

APPENDIX

Appendix A: Opinion and Entry of the Ohio Tenth District Court of Appeals, State v. Clellan (August 17, 2010), 10th Dist. No. 09AP-1043, 2010-Ohio-3841.

Appendix B: Opinion and Entry of the Ohio Tenth District Court of Appeals on Application for Reopening, Denial of rehearing, State v. Clellan (February 8, 2011), Franklin App. No. 09 AP – 1043, unpublished.

Appendix C: Entry of the Supreme Court of Ohio, unpublished, State v. Clellan (January 19 2011), Case No. 2010 – 1711.

Appendix D: Request for Discovery made March 10, 2009 by Petitioner.

Appendix E: U.S. Const. amend. II.

Appendix F: U.S. Const. amend. VI.

Appendix G: U.S. Const. amend. XIV.

Appendix H: O.R.C. 2901.05.

Appendix I: O.R.C. 2903.21.

Appendix J: Proposed Jury Instructions. (in pertinent part)

Appendix K: Jury Instructions presented. (in pertinent part)

Appendix L: 911 Transcription; Feb. 04, 09.

Appendix M: Purloined Statement of Deputy

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

Banks v. Dretke, 540 U.S. 668, 124 S. Ct. 1256, (2004)..... 15

Brady v. Maryland, 373 U.S. 83 (1963) 11

Davis v. Alaska, 415 U.S. 308 (1974) 16

Kyles v. Whitley, 514 U.S. 419 (1995) 11

State v. Benson, 152 Ohio App.3d 495, 2003-Ohio-1944 .....9 & 13

State v. Benton, (2000). 136 Ohio App.3d 801...9 & 13

State v. Bidinost, (1994), 71 Ohio St.3d 449.....13

State v. Geeslin, 116 Ohio St.3d 252, 2007-Ohio-5239.....9

State v. Glunt, 10th Dist. No. 09 AP-962, 2010-Ohio-3024.....11

State v. Parson (1983), 6 ohio St.3d 442 14

State v. Underwood 3 Ohio St.3d 489 20

State v. Williams (1977), 51 Ohio St.2d 112 20

State v. Washington (1984), 446 U.S. 668.....13 & 14

CONSTITUTIONAL AND STATUTORY PROVISIONS PAGE

U.S. Const. amend. II 2

U.S. Const. amend. VI 2

U.S. Const. amend XIV 2

O.R.C. Section 2901.05 .....2 & 3

O.R.C. Section 2903.21 3

PETITION FOR WRIT OF CERTIORARI

Petitioner, John R. Clellan, respectfully prays that a writ of certiorari issue to review the judgments below of the Tenth District Court of Appeals and of the Supreme Court of Ohio.

OPINIONS BELOW

The opinion and entry of the Ohio Tenth District Court of Appeals appears at Appendix A to the Petition, State v. Clellan (August 17, 2010), 10th Dist. No. 09 AP- 1043, 2010- Ohio-3841.

The opinion and entry of the Ohio Tenth District Court on Application for Reopening and the denial of rehearing appears at Appendix B to the Petition, State v. Clellan (February 9, 2011), Franklin App. No. 09 AP-1043, unpublished.

The entry of the Supreme Court of Ohio appears at Appendix C to the Petition and is unpublished, State v. Clellan (January 19, 2011), Case No. 2010-1711.

JURISDICTION

Petitioner is appealing the declining of jurisdiction by the Supreme Court of Ohio, Ohio v. Clellan, Case No. 2010-1711 decided January 19, 2011 and the denial of the Application for Reopening, State v. Clellan (February 8, 2011), Franklin App. No. 09 AP-1043.

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Second Amendment to the United States Constitution provides, in pertinent part:

". . . the right of the people to keep and bear arms shall not be infringed."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

"In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, Section 1.

The Ohio Revised Code Section 2901.05, Ohio's "Castle Doctrine" provides in pertinent part:

"Burden and degree of proof; presumption concerning self-defense or defense of another; jury instructions concerning reasonable doubt

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmativedefense, is upon the accused.

(A) (1) Subject to division (B) (2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the de-fensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2) (a) The presumption set forth in division (B) (1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b) The presumption set forth in division (B) (1) of this section does not apply if the person who uses the defensive force uses it while in a residence of

vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3) The presumption set forth in division (B) (1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

The Ohio Revised Code Section 2903.21 (Aggravated Menacing) provides, in pertinent part:

"(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person"

STATEMENT OF THE CASE

I. Mr. Clellan's Trial

This case arises from the October 9, 2009 conviction and sentence of the Petitioner, John R. Clellan, in the Franklin County, Ohio Municipal Court, for Aggravated Menacing. The prosecution argued Mr. Clellan without cause pulled a gun on Robert L. Litchfield. The defense presented witnesses that testified that Litchfield admittedly went up to Petitioner stating, "If you're gonna run your mouth, I'm gonna whip your ass." (Transcript p. at 51, lines 5 & 6 and p. at 96, lines 2 & 3). Petitioner was in his own vehicle on his own property when Litchfield, whom Petitioner did not know, came up to him. Petitioner ultimately produced a pistol and demanded Litchfield to get away from Petitioner's truck and off of his property.

On February 4, 2009, the Petitioner's wife, returning home from shopping asked him to bring in some packages from their truck. Petitioner planned to turn the truck around so that it would face out of the driveway. (Transcript p. at 209, lines 18 –23). The ground was covered with ice and snow that day. (Transcript p. at 209, lines 9 –11). There were many embankments of plowed snow on the road and driveways on Darby Boulevard where Petitioner and his wife lived. (Transcript p. at 165, lines 15 – 19). As Petitioner was attempting to turn his truck around, a car driven by Robert L. Litchfield pulled past him and parked crossways in the road blocking Petitioner's driveway in which he was trying to re-park his truck. (Transcript p. at 33, lines 20 – 21).

As Petitioner backed up over a snow bank on his own property in order to pass the stranger's car parked in his way, (Transcript p. at 210, lines 18 – 23), Petitioner's then neighbor, Ms. Devine-Riley, yelled at Petitioner to "wait a damn minute and we'll be out of your way," and words were exchanged between Petitioner and Ms. Devine-Riley. (Transcript p. at 211, lines 5 – 24). Eventually, Mr. Litchfield, for no given reason, involved himself. (Transcript p. at 212, lines 2 –13). The incident escalated when Litchfield approached Petitioner angrily. (Transcript p. at 212, lines 11 – 21). From Litchfield's threats and actions, Petitioner began to believe Mr. Litchfield was "nuts" and intended to harm him. (Transcript p. at 212, lines 20 – 22).

Petitioner was previously victim of two muggings by strangers, one of which resulted in an orbital blow-out fracture to his left eye, leaving his eye vulnerable to any strike. (Transcript p. at 206, lines 18 – 25 and p. at 207, lines 22 – 24). Petitioner, in addition, has a genetic eye disorder that renders him legally blind without special contact lenses that dislodge easily due to the bulging of the eye surface. (Transcript p. at 205, lines 23 – 25 and p. at 206, lines 1 – 7).

Petitioner grabbed his wife's unloaded gun kept in the truck's console and held it at his side. (Transcript p. at 212, lines 22 – 23). Ms. Devine-Riley who was standing on the passenger side of the truck near Litchfield's car's trunk, yelled to Litchfield that Petitioner had a gun. (Transcript p. at 213, lines 9 – 10). At that point, Mr. Litchfield became enraged, charged up to Petitioner's truck door which was open at a right angle to the truck's body with its window completely open and attempted to climb up a snow mound on Petitioner's property to get at Petitioner through the open truck door's open window. (Transcript p. at 213, lines 16, 23 – 24). Ms. Devine-Riley ran up and grabbed Litchfield's coat sleeve, pulling on him and eventually persuading Litchfield to follow her back towards his own car. (Transcript p. at 213, lines 24 –25 and p. at 214, lines 1 – 25). Petitioner put the gun down, shifted the truck into 4-wheel drive and continued backing into his drive and off his snow-mounded lawn. (Transcript p. at 214, lines 18 – 22).

Petitioner's wife had come out of their home when she heard Devine-Riley yelling at Petitioner to "wait a damn minute." (Transcript p. at 168, lines 10 – 21). As Petitioner backed his truck, Devine-Riley and Litchfield chased the truck down the Petitioner's driveway. (Transcript p. at 214, lines 22 – 25 and p. at 215, lines 1 – 2). Petitioner saw his wife being attacked by Litchfield and Devine-Riley and handed the gun to his wife through the open window, telling her to "shoot them if they try to hurt us." (Transcript p. at 215, lines 11 – 13). Petitioner got the truck parked, exited his vehicle and ran to his wife. Together, they made it to their home, locked the door and called the sheriff. (Transcript p. at 215, lines 24 – 25 and p. at 216, line 1).

While Mrs. Clellan was on the phone, she was informed that the deputies were there. (Transcript p. at 216, lines 2 – 3). Petitioner and his wife went outside to speak with deputies at which point the were immediately handcuffed and placed in patrol cars. (Transcript p. at 216, lines 6 – 19). Petitioner was interrogated on dash camera recording, and he and his wife, without being Mirandized, were taken to jail and charged with Aggravated Menacing.

A combined trial was held for Petitioner and his wife before a jury on October 6, 2009. Mrs. Clellan was found not guilty by the jury. (Transcript p. at 325, lines 13 – 19). Petitioner was found guilty by the same jury. (Transcript p. at 325, lines 21 – 25).

II. State Court Appeals

On November 6, 2009, Petitioner filed a Notice of Appeal to the State of Ohio Court of Appeals for the Tenth District. A decision was rendered on August 17, 2010, affirming Petitioner's conviction and sentence in State v. Clellan, 10th Dist. No. 09 AP-1043, 2010-Ohio-3841 and Petitioner timely filed an appeal to the Supreme Court of Ohio, which, on January 19, 2011 declined to accept jurisdiction. On November 15, 2010, an Application for Reopening was filed in the Franklin County, Ohio Tenth District Court of Appeals. On February 8, 2011, a decision was rendered denying Petitioner's Application.

REASONS FOR GRANTING THE WRIT

I. **Where an appellate court reviews an Application for Reopening an appeal based upon a claim of ineffective assistance of appellate counsel, that Court may not find failure to preserve and produce Petitioner's requested dash camera-videoed alleged "confession" of Petitioner after arrest and disputed position of attacker's car in roadway as only potentially useful evidence and not materially exculpatory when such decision conflicts with established appellate case law.**

Clellan argues here and below that the Tenth District Court of Appeals on Application for Reopening entered a decision finding that failure of the state to disclose and produce upon demand (Request for Discovery at Appendix D, Items 2 & 6),

the taped alleged "confession" of Mr. Clellan from a cruiser mounted dash camera which cameras (two cruisers) also would have shown the disputed position of Litchfield's vehicle and the tracks of Clellan's truck and disputed footprints of the attacker (requested to be seen by jury) on Clellan's snow-covered property upon deputies arrival at scene, did not violate Petitioner's due process rights and did not require a dismissal of charge because such evidence "does not address the substance of the charge," as "the video did not capture the activity giving rise to the Aggravated Menacing charge, but only post-incident police activity on arriving at the scene," and therefore the video is "only potentially useful evidence." (See Appendix B, p. at 3, P. 7 and p. at 4, P.7 cont.). The Appellate Court cited State v. Geeslin, 116 Ohio St.3d 252, 2007-Ohio-5239, P. 12 – 13. The Appellate Court's decision regarding the State's failure to disclose or produce dash camera recordings not violating Petitioner's due process rights is in conflict with the decisions of other courts of appeal on this matter. (see e.g. State v. Benton (2000), 136 Ohio App.3d 801 (failure to preserve highway patrol tapes, in light of discovery motion, required dismissal; State v. Benson, 152 Ohio App. 3d 495, 2003-Ohio-1944 (due process rights were violated when tape from cruiser mounted dash camera was destroyed following discovery request). The evidence should have been found to be materially exculpatory in the instant matter, especially in light of the fact that the Appellate Court in its decision of August 17, 2010 recounts fully Deputy Felkner's testimony about what Petitioner purportedly "confessed" on camera in the back of the

police cruiser. Without the production of the dash camera recording, the deputy was at liberty to testify that Petitioner stated whatever the deputy wished him to have said, and further, not mention that neither Petitioner or his co-defendant wife were ever "Mirandized." The officer's "carte blanche" ability to essentially confess for Clellan was so materially damaging to Petitioner's case that even those same appellate judges relied heavily upon the officer's rendition of Petitioner's purported statement on camera in their direct appeal decision:

> "Deputy Brian Felkner also provided testimony supporting Litchfield's version of the events, testifying defendant changed his story about what occurred. Defendant initially told Felkner that Litchfield tried to pull him out of his vehicle by reaching through the window. When Felkner asked defendant how he could brandish a firearm while being pulled out of the truck, defendant admitted Litchfield was not pulling him from the vehicle, but only reached into the truck's window. Confused about why Litchfield would reach into the vehicle without doing anything else, Felkner inquired further. Defendant then admitted Litchfield did not reach into the vehicle; defendant only thought Litchfield would do so." (see Appendix A at p. 9, P.22, emphasis added).

The Appellate Court continued addressing the obvious weight of Officer Felkner's testimony regarding Clellan's recorded "confession," by stating:

> "Given the discrepancies in testimony Litchfield

> and defendant offered, the jury could have reasonably found Felkner's testimony (of Clellan's alleged "confession"on dash camera video) supported Litchfield's version of events and thus concluded Litchfield was not in the process of unlawfully and without privilege entering defendant's vehicle." (Id., at p. 9 & 10, P. 23).

Thus, even the Appellate Court agreed such purported "confession" Deputy Felkner testified to could have persuaded the jury to find Petitioner guilty by removing his defense under the "Castle Doctrine." (see Appendix H). Petitioner asserts his admittedly recorded "confession" would have refuted the officer's testimony regarding such. The Appellate Court in its February 8, 2011 decision, however, citing State v. Glunt, 10th Dist. No. 09 AP-962, 2010-Ohio-3024 at P. 13, asserted:

> "Evidence is materially exculpatory if 'There is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the court held:

> "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (see also Kyles v. Whitley, 514 U.S.419, 432 (1995).

The Appellate Court's two decisions are inherently at conflict with each other as well as with the abounding case law on this discovery issue.

II. **Where an appellate court denies an Application for Reopening an appeal as stated above, that Court may not find failure to produce in discovery a deputy's statement presented the second day of trial and entered into evidence by the trial judge without objection from Petitioner's counsel not prejudicial to him or to the outcome of his case, without examination of that officer's statement/exhibit and relying only on the transcribed description of such evidence.**

On March 10, 2009, trial counsel served a Request for Discovery upon the State. (see Appendix D). Notably, the Request for Discovery asked for:

> 2. Copies of any written or recorded statements made by defendant or any co-defendant, or written summaries of any oral statements made by the same to any law enforcement officer . . .
>
> * * *
>
> 6. Disclosure of any evidence known or which may become known to the Prosecuting Attorney favorable to the defendant and material to either guilt or punishment per Ohio Criminal Rule 16(B)(1)(f).

Despite this request, the State did not produce copies of a statement attributed to Clellan by Deputy Brian Felkner until the second day of trial, (Transcript at p. 77 – 78) at which time the State brought a potential evidentiary issue regarding such statement attributed to Clellan but signed by the officer to the Trial Court's attention. Mr. Clellan's counsel did not object to the introduction of the purported statement, did not move to have the statement or any associated testimony excluded, and instead simply excused the nondisclosure as "either inadvertence or omission . . . We're not going to make an issue of it." (Transcript at p. 78, lines 1-16). Having failed to provide this statement in discovery, the Trial Court should have sanctioned the State by dismissing the charges against Clellan, or at a minimum, by excluding Deputy Felkner's testimony attributed to Clellan. (see e.g. State v. Bidinost (1994), 71 Ohio St.3d 449, 456 – 457; see also State v. Benton (2000), 136 Ohio App.3d 801; State v. Benson 152 Ohio App.3d 495, 2003-Ohio-1944).

Petitioner's trial and appellate counselors' performance here fell below standards set forth by the by the United States Supreme Court in Strickland v. Washington (1984), 466 U.S. 668. A two-prong test requires a defendant to show: 1) counsel's performance was deficient; and 2) the defendant was prejudiced. Id. A defendant establishes counsel's deficient performance when that performance falls below an objective standard of reasonableness and the client is prejudiced by counsel's breach of duty. Strickland, 466 U.S. at 690,

696. As for the prejudice step of the Strickland test, the Court stated;

> "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Strickland, 466 U.S. at 694.

Foreknowledge of the statement would have aided Mr. Clellan's defense and admission of the statement as an exhibit for the jury was certainly prejudicial to Petitioner as it directly contradicted his testimony. As such, the Trial Court should have excluded the statement and any related testimony by Deputy Felkner. Id.; see also State v. Parson (1983), 6 Ohio St.3d 442, 445. The errors of Clellan's trial counsel are outrageous and by appellate counsel failing to raise these evidentiary issues as ineffective assistance of counsel errors on appeal, Clellan's appellate counsel deprived him of a real opportunity to have his conviction vacated and the case re-tried.

These errors were so serious that counsel was not functioning as the "counsel" the Sixth Amendment (see Appendix F), guarantees. Strickland v. Washington, (1984), 466 U.S. 668, 687, 104 St.Ct. 2052, 2064.

The Appellate Court on Application for Reopening the appeal (see Appendix B), although provided with Deputy Felkner's statement as an exhibit (actually

entered into evidence by the trial judge, herself), (Transcript at p. 154, lines 7 – 10), did not examine the actual disputed document. Instead, the Court stated:

> "Although defense counsel on page 78 of the trial transcript alluded to a 'purported statement from our clients that we had not gotten until today,' we are unable to determine the nature of the statement or its content." (see Appendix B, at p. 4, P. 8).

The Court therefore ruled it "lack(s) a basis to conclude, as defendant argues, that the State's failure to produce the 'statement' earlier in the proceedings prejudiced him or probably would have resulted in a different outcome at trial . . ." Id. Although the Appellate Court referred to itself as a "thirteenth juror," it, unlike the actual jury, did not read or regard the statement presented as an exhibit at trial and provided to the Appellate Court upon appeal.

The defense was denied access to Officer Felkner's statement that was used to impeach Petitioner's testimony. In Banks v. Dretke 540 U.S. 668, 124 S. Ct. 1256, (2004), the Court stated that "a rule that 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process[,]." In light of such instances of disparate testimony, the Trial Court committed prejudicial, reversible error by refusing to permit defense counsel access to the underlying police

statement. "The right of counsel for the accused to confront, cross-examine and impeach is cherished and remains the means by which 'the scope and the truth of his testimony are tested.'" Davis v. Alaska, 415 U.S. 308, 316 (1974) (Burger, C.J.) The State's denial of prior access to the deputy's statement upon request violated due process by the inclusion of impeaching evidence and denied the Petitioner a fair trial. The Petitioner Clellan has lost an opportunity in front of the jury to challenge the State's most important witness on his understanding and representation of what Mr. Clellan actually stated to him. One particular apparent discrepancy in Petitioner's alleged statement to the deputy might have been fielded by Petitioner and explained had he had foreknowledge of the officer's written statement:

> "Defendant initially told Felkner that Litchfield tried to pull him out of his vehicle by reaching through the window . . . Defendant then admitted Litchfield did not reach into the vehicle; defendant only thought Litchfield would do so." Appellate decision of August 17, 2010 – State v. Clellan, 10th Dist. No.09 AP-1043, 2010-Ohio-3841 at p. 9, Section 22. (see Exhibit A).

Petitioner if granted the foreknowledge and opportunity would have explained to the jury that the door of the truck was swung open with the window rolled completely down, thus giving rise to the situation whereby Litchfield grabbed through the open window and yet did not reach into the vehicle because the door was open and Litchfield's arm was

not long enough at that point to reach into the truck cab, although he was attempting to do so. The allowance of the deputy's statement at trial was tantamount to trial by ambush.

III. **Where a "test case" for the "Castle Doctrine" is presented to a jury along with an improper Proposed Jury Instruction regarding Ohio Revised Code Section 2901.05 (see Appendix H), that was further improperly modified by the trial court, the reviewing court may not find such confusing jury instructions did not deprive Petitioner of a fair trial and due process rights.**

On March 16, 2009, trial counsel submitted a Proposed Jury Instruction regarding Ohio Revised Code Section 2901.05, more commonly known as the "Castle Doctrine." (see Appendices J & H). Trial counsel's Proposed Jury Instruction is an incorrect and incomplete statement of the "Castle Doctrine." Left out of the Proposed Jury Instruction are the two conditions that actually can rebut the presumption of self defense, namely Ohio Revised Code Section 2901.05 (B)(2)(a) and (b):

> 2(a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of the residence or vehicle.
>
> (b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses

> it while in a residence or vehicle and the person is unlawfully and without privilege to be, in that residence or vehicle. (see Appendix H).

Once Ohio Revised Code Section 2901.05(B)(1) applied, Clellan was entitled to a presumption that he acted in self-defense and he had no burden to prove anything else related to the events of February 4, 2009. However, the Proposed Jury Instruction ignored these conditions the State had to prove in order to rebut Clellan's presumptive defense per Ohio Revised Code 2905.01. There was no evidence in the record that Litchfield (the person against whom defensive force was used) had a right to be in Clellan's truck or that Clellan was unlawfully, and without privilege to be, in his truck. Accordingly, the State failing to meet its burden, Clellan was entitled to a presumption of self-defense under the "Castle Doctrine." The jury's consideration of Clellan's defense was tainted by trial counsel's incomplete and erroneous Proposed Jury Instruction that confused the Ohio Revised Code Section 2905.01 inquiry. Without jury interrogatories, this Court has no insight into where the jury may have been led astray in its deliberations and application of the "Castle Doctrine." The proper result was for the conviction to be vacated and a new trial held.

Compounding trial counsel's error was the Court's attempt to revise the actual jury instruction and his failure to object to the modification. Language was added by the trial court to the instruction stating:

> "While the burden is always on the defendant to prove self-defense, the law creates a presumption that the person acted in self-defense in certain circumstances. This means that if you find by a preponderance of the evidence that the following factors are true, you must find that the defendant acted in self-defense and must enter a verdict of not guilty. (Transcript p. at 312, lines 1 - 9).

The "factors" the Court is referring to are not those explicitly set forth in Ohio Revised Code Section 2905.01(B)(2)(a) and (b), but are two new factors erroneously proposed by trial counsel, namely that Clellan used defensive force and that Litchfield was in the process of unlawfully entering Clellan's vehicle. This combination resulted in an improper jury instruction (see Appendix K), concerning the "Castle Doctrine."

Trial counsel failed to object to Court's instruction and therefore, "[t]he failure to object to a jury instruction constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial, would have been otherwise. State v. Underwood (1983), 3 Ohio St.3d 12, at syllabus. Absent plain error, the failure to object to improprieties in jury instructions, as required by Ohio Criminal Rule 30, is a waiver of the issue on appeal. State v. Underwood, 3 Ohio St.3d citing; State v. Williams (1977), 51 Ohio St.2d 112.

Appellate counsel's failure to recognize trial counsel's error and present it as part of the

ineffective assistance of counsel argument on direct appeal, so prejudiced Petitioner in that it forfeited the opportunity to have the issue reviewed by this Court and the opportunity to have his conviction vacated and the case remanded for a new trial where the jury's deliberations would not be tainted by this misstatement of the "Castle Doctrine."

However, the Appellate Court on appeal did raise the issue of the presumption of self-defense under Ohio Revised Code 2901.05 as relates to instructions to the jury in its analysis of Petitioner's assignment of error on the basis that his conviction was against the manifest weight of the evidence. (see Appendix A, p. at 8, P. 20). The Court states that:

> "Defendant initially argues the jury lost its way because the prosecution never rebutted the presumption of self-defense set forth in R.C. 2901.05(B), sometimes referred to as the 'Castle Doctrine.' (see Appendix A, p. at 8, P. 20).

Unfortunately, the Appellate Court proceeds to quote from the instructions to the jury as if there were no apparent problem with their recital of the "Castle Doctrine," and loses its own way in interpretation and application of the plain language of the Statute.

The Appellate Court in its decision of February 8, 2011, (see Appendix B, p. at 5, P. 10), states that "The trial court is not required to instruct on matters the evidence does not implicate," citing State v. Scott

(1986), 26 Ohio St.3d 92, 101. The Appellate Court has first determined that an unproduced officer's statement regarding Clellan's purported "confession" upon arrest and the destruction of the very dash camera recording of that "confession" were not prejudicial to Petitioner's case, yet counter this position by asserting:

> "any presumption of self-defense was eliminated (up)on the jury's believing the person against whom defendant used force did not attempt to enter defendant's vehicle, **a proposition the deputy sheriff testified defendant ultimately admitted was true.** As a result, defendant's argument concerning jury instructions fails to support his contention that the additional instructions, with reasonable probability, would have produced a different outcome at trial." (see Appendix B, p. at 5, P. 10).

The Court is essentially using a circular argument that destroyed dash camera videos and an undisclosed purported "confession," though not deemed materially exculpatory evidence, are now proof that a morass of cobbled jury instructions could not have caused any real problems for Petitioner who was doomed anyway due to evidence destroyed and not timely produced. The variables in this case, the destroyed dash camera recording, the officer's undisclosed statement pertaining to Clellan's supposed "confession," the officer's testimony of Petitioner's alleged oral statement and the baffling

jury instructions conspired to boot-strap the Court's position and ensured Petitioner's conviction, thus depriving him of a fair trial and due process under the law.

IV. **Where an attacker had admitted to a 911 dispatcher that he went up to Petitioner who was lawfully in his own vehicle and began threatening Petitioner, the Appellate Court, both on appeal and on Application for Reopening, may not rely on its own interpretation of what "in the process" entails, adding onerous burdens on the defense not intended by the "Castle Doctrine."**

The Appellate Court on direct appeal asserted Petitioner had failed to meet proof of the "second" factor and then proceeded to create yet a "third" factor which hurdle Petitioner had not cleared: 2) (a) whether Litchfield (the aggressor) was in "the process," and (b) whether Petitioner occupied the vehicle because he was at times standing on the rocker panel or running board of the truck although the engine was still running. Throughout its decision, the Appellate Court continued to add burdens to Petitioner's presumption of self-defense, stating that Litchfield, "never touched it (truck)," that Litchfield may have reached through the window, but did not reach into the cab of the truck, that Petitioner was standing, but not seated at all times in the truck and therefore was not technically "in" the truck. The statute does not set forth that the aggressor must "grab the handle," as the Prosecutor

alleged (although many vehicles do not even have doors let alone handles), or that the person must "touch" or "reach into" the vehicle to be "in the process" of entering a vehicle, or even what "in the process" actually means. The word "vehicle" is defined in the statute as well as the word "residence," but nowhere is it outlined as the Court appears to believe it is what is necessary for a "process" to begin. Further, although the statute clearly includes the porch of a residence within the protected area, the Court did not find a running board, rocker panel or floorboard to be analogous to a deck or porch on a house. No attempt was made by Petitioner's counsel, appellate or otherwise, to address the truth that anyone found in the position of Petitioner in a vehicle and charged with D.U.I. would have been found to be in control of or "occupying" that vehicle. Much is also made of the fact that the Petitioner was alleged to have stated that he only "thought" Litchfield would reach into Petitioner's truck. It begs the question as to how "in the process" is established and whose perceptions are to be determinative when assessing whether someone is "in the process." Petitioner asserts that any action taken with the intention or appearance of a hostile end toward an occupied vehicle constitutes being "in the process," according to the "Castle Doctrine." Petitioner further asserts that it is not necessary for one to be "in" a vehicle to "occupy" it. There is no means by which a person might be considered to be "in" a motorcycle for example and yet such a conveyance is included within the parameters of vehicles under the "Castle Doctrine."

The Appellate Court in its decision of August 17, 2010 recited:

> "Pursuant to the provisions of R.C. 2901.05(B), the court instructed the jury that if it were to find by a preponderance of the evidence (1) 'the defendant used defensive force,' and (2) 'the person against whom the defensive force was used was in the process of unlawfully and without privilege to do so, entering the residence and/or vehicle occupied by the defendant,' then the jury must find defendant acted in self-defense and enter a verdict of not guilty." (Tr. 312). (see Appendix A, p. at 8, P. 20).

The Appellate Court in its decision rendered August 17, 2010, stated that of the "two factors,"only the second was disputed. (see Appendix A, p. at 8, P. 20). In other words the Court conceded that the Petitioner had acted using **defensive force**. Even the Clellans' trial Prosecutor Kristen Rine during a related trial stated that, "These people (Clellans) have used guns to **protect** themselves before." (State v. Clellan, Case No. 10AP-44, Decision of December 2, 2010, finding trial court Judge Andrea Peeples abused her discretion by denying expungement to Clellan who was found not guilty; Transcript from expungement hearing, p. at 3, lines 14 & 15).

The Court states, however, the second "factor" is disputed in that parties "presented conflicting evidence whether the instigator was in the process of

unlawfully entering defendant's vehicle and whether defendant occupied the vehicle." Petitioner submits the State's witness in such a matter will always present "conflicting evidence" in any case wherein a defendant has made a not guilty plea. Much that the Appellate Court has taken to be "conflicting," when viewed in context is not, in fact, conflicting. The instigator in the instant case in a 911 recording, entered into evidence by the prosecution (see Appendix L), states: "I went **up to him** and said, '**If you're gonna run your mouth** . . .' you know, whatever." (Transcript p. at 51, lines 5 & 6 and p. at 96, lines 2 & 3). This statement by the instigator was made in the "heat of the moment" and certainly constitutes an admission against interest regarding his actual process on the scene. Litchfield further testified he had exited his own vehicle **angry** (Transcript p. at 100, lines 8 – 14 and p. at 105, lines 18 – 24), and he "**had (his) arms up**. I said, "What the f _ _ _ is your problem?" (Transcript p. at 40, line 4). Dressed like a mobster in a full-length black leather coat and sporting a foot and a half long ponytail, he instantly took an aggressive posture. His companion, Devine-Riley, testified she did not know why Litchfield even got out of his car at that time and did not leave his vehicle for four or more minutes after her first confrontation with Petitioner and that no threats were made prior to Litchfield entering the scene. Mr. Litchfield, in fact, testified Petitioner was scared of Litchfield. (Transcript p. at 103, lines 20 –23).

It is in the public interest for the mystery of terms of the "Castle Doctrine" to be dispelled and clarified

for the citizenry to better rely upon it and not upon some ambiguous or arbitrary interpretation of the law. Confusion in the law must be dealt with or people will act upon its vagaries. It must, for the public interest's sake, be determined why Petitioner's perspective and assessment of his observations should not be held to be relevant in terms of this Statute, if, indeed, they are not. The purpose of the Statute is of paramount importance. Is it to protect vehicles or occupants, or both? What if the instigator's sole intention is to drag the driver out of his truck and thrash him, not to commandeer or even enter the vehicle? What if the instigator's attempts to enter are woefully inadequate or are met with the successful resistance of an armed occupant? Does the "Castle Doctrine" not grant assistance to the Petitioner who has only his own "heat of the moment" perceptions upon which to instantly respond?

By the courts permitting piece-meal and conflicting interpretations of the "Castle Doctrine," and the Statute's inherent failure to provide clear definitions for crucial terms, the "Castle Doctrine" creates a wide chasm making it far more beneficial had Petitioner <u>not</u> been in a vehicle due to the court's argument that he "could have just driven away" (when retreat was not contemplated by the statute's drafters), or that he was not properly "occupying" his vehicle in order to avail himself of its intended protections, or that the intruder was not "in the process" unless and until some mythical demarcation is traversed by him. The courts and law enforcement will continue to undermine the legislative intent of those drafters of the "Castle Doctrine," ignoring the plain meaning of text, and creating their own

unsupported view of self-defense, unless and until the Supreme Court of the United States exercises its supervisory power to protect the inalienable right of self-defense of our citizens.

V. The Supreme Court of Ohio should not have declined jurisdiction to hear a "test case" under Ohio's new "Castle Doctrine" which as interpreted by the Trial and Appellate Courts denies Petitioner the constitutional right of self-defense.

Petitioner asserts that it is within the jurisdiction of the Supreme Court of Ohio and of the Supreme Court of the United States of America to uphold the constitutional and inalienable right of self-defense. It appears to Petitioner from comments from the judges of the courts of Ohio that the use of a gun to protect oneself or a loved one from the threat of violence, even to ward off an attack from a person intent on doing evil, is anathema to a majority of the courts' members. The fact that the "Castle Doctrine" was drafted, met with vehement resistance from both court officials and police officers in the great State of Ohio, and yet passed into law in September 2008, is ample proof that the citizenry of Ohio wish to maintain the right of self-defense and defense of others in a mounting onslaught of violent and drug-addicted would-be attackers and perverts. The sentiment of anti-gun advocates, including numerous judges, court officials, police officers, politicians and high-profile testimonial tub thumpers is capsulated in the off-hand comment of one of the prosecutors who tried Petitioner's criminal case. She stated that it was "alright to own a gun, just not to use one." (Franklin County, Ohio Prosecutor Orly

Ahroni at oral argument in Case No. 10AP-44, Tenth Appellate District Court of Appeals of Ohio). Petitioner asserts that the "Castle Doctrine" implemented in Ohio in 2008 does not provide for self-defense or the defense of others by any means other than by the use of a firearm weapon. The "Castle Doctrine" has become an entrapment tool for good, law-abiding citizens who are assaulted or threatened with immediate harm and rely on it to their detriment. Ohio courts have not been successful in attempts to ban gun ownership and possession of firearms by common, decent persons in the state, however, through willful and vehement disregard of the laws using overlays of hindsight bias and through bogus interpretations of the provisions of self-defense statutes, the rightful use of guns for self-protection is being eroded and the autonomy and self-preservation of a free people is now in grave danger. Petitioner respectfully requests the Supreme Court of the United States to intervene on his behalf and on behalf of those other lawful persons in like circumstances.

VI. Where Petitioner and his co-defendant were tried together, both claiming self-defense/or defense of another based on the new "Castle Doctrine," there was unequal protection of Petitioner whose co-defendant (who came to his rescue) was found not guilty by the same jury.

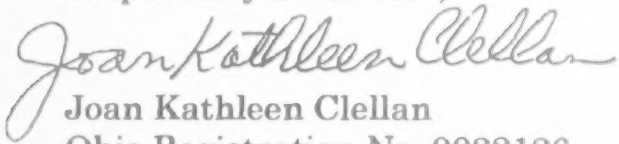
Given the fact that the jury found Petitioner's co-defendant not guilty based on the same facts, laws and testimony, this was significant error. The inconsistent verdicts of Petitioner and his co-defendant who testified she had come to his defense while under attack, would suggest there was unequal protection under the law. Petitioner was denied constitutional rights to equal protection under the Fourteenth Amendment of the United States Constitution, (see Appendix

G), due to the fact he received arbitrary results in having been found guilty, while his wife who was charged with the same crime and participated in the same endeavor to protect Petitioner and herself, and claimed the same defenses under the same statutes, was found not guilty by the jury. This ought not to be so.

CONCLUSION

Petitioner John R. Clellan implores that this Court will please grant his petition for writ of certiorari to address the questions presented and determine whether the Tenth District Court of Appeals and the Supreme Court of Ohio invoked an incorrect standard of review in first affirming his conviction in the trial court, then denying his Application for Reopening the Appeal and finally declining jurisdiction to hear his case and dismissing the appeal as not involving any substantial constitutional question.

Respectfully submitted,



Joan Kathleen Clellan
Ohio Registration No. 0022126
P. O. Box 492
Galloway, Ohio 43119
(614) 561-8657

Counsel of Record
Counsel for Petitioner Clellan

Supreme Court, U.S.
FILED

10 13 13 APR 20 2011

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN J. CLELLAN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

APPENDIX

FOR PETITION FOR WRIT OF CERTIORARI

JOAN KATHLEEN CLELLAN
COUNSEL OF RECORD
P. O. BOX 492
GALLOWAY, OHIO 43119
(614) 561-8657
E-MAIL: jim.dandy60@yahoo.com

April 19, 2011

TABLE OF CONTENTS

APPENDIX

A - August 17, 2010 decision on direct appeal

B - February 8, 2011 decision for reopening

C - January 19, 2011 decision of Ohio Sup. Ct.

D- Request for Discovery

E- Second amendment of U.S Constitution

F- Sixth amendment of U.S. Constitution

G- Fourteenth amendment of U.S. Const.

H- O.R.C. 2901.05 "Castle Doctrine"

I- O.R.C. 2903.21 (Aggravated Menacing)

J- Proposed Jury Instructions

K- Jury Instructions

L- 911 Transcript

M- Purloined Statement of Deputy Felkner

{A}

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellee

v. No. 09AP-1043
(M.C. 2009 CRB 2626

John Clellan, (REGULAR CALENDAR)

Defendant-Appellant.

DECISION

Rendered on August 17, 2010

Richard C. Pfeiffer, Jr., City Attorney, Lara N. Baker, City Prosecutor, Melanie R. Tobias and Orly Ahroni, for appellee.

Javier H. Armengau, for appellant.

APPEAL from the Franklin County Municipal Court

BRYANT, J.

1) Defendant-appellant, John Clellan, appeals from a judgment of the Franklin County Municipal

Court finding him guilty, pursuant to jury verdict, of aggravated menacing in violation of R.C. 2903.21. Because (1) sufficient evidence supports the jury's verdict, (2) the manifest weight of the evidence supports the jury's verdict, and (3) defendant's counsel was not ineffective, we affirm.

1. PROCEDURAL HISTORY

2) On February 4, 2009, an argument arose between defendant and Robert Litchfield on a Grove City street concerning Litchfield's parked car, which partially blocked defendant's path to his driveway. As the argument escalated, defendant pulled a gun on, an threatened to shoot, Litchfield.
3) As a result of the incident, a complaint was filed in the Franklin County Municipal Court on February 5, 2009 charging defendant with aggravated menacing in violation of R.C. 2903.21. The complaint stated that defendant did "[k]nowingly cause another, to wit: Robert L. Litchfield, to believe that John Clellan would cause serious physical harm to said other, to wit: John Clellan pointed a handgun at Mr. Litchfield and stated, "I'll kill your ass."
4) Trial began on October 6, 2009, and the prosecution presented testimony from Litchfield, his brother-in-law's girlfriend, Karen Devine-Riley, and Deputy Brian Felkner. The defense followed with testimony of defendant and his wife, Joan, who was charged separately with the same offense

and subsequently was found not guilty. Based on the evidence, the jury found defendant guilty of aggravated menacing, and the trial court sentenced defendant accordingly.

II. ASSIGNMENTS OF ERROR

5) Defendant appeals, assigning the following errors:

ASSIGNMENT OF ERROR I:
The trial court erred by not granting Appellant's Motion for a Rule 29 Dismissal.

ASSIGNMENT OF ERROR II:
The convictions in the instant case are not supported by sufficient evidence.

ASSIGNMENT OF ERROR III:
The convictions in the instant case are against the manifest weight of the evidence.

ASSIGNMENT OF ERROR IV:
Trial counsel was ineffective for failing to make any argument whatsoever for his Rule 29 Motion to Dismiss.

ASSIGNMENT OF ERROR V:
Trial counsel was ineffective for failing to make a Motion for a Judgment Notwithstanding the Verdict.

III. FIRST AND SECOND ASSIGNMENTS OF ERROR - SUFFICIENCY OF THE EVIDENCE

6) Defendant's first and second assignments of error contend not only that the state failed to present sufficient evidence to support the charged offense but that the trial court erred in denying defendant's Crim.R. 29 motion for acquittal.

7) Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because analysis of the evidence for the purposes of a Crim.R. 29(A) motion looks at the sufficiency of the evidence, a Crim.R. 29(A) motion and a review of the sufficiency of the evidence are subject to the same analysis. State v. Tenace. 109 Ohio St.3d 255, 2006-Ohio-2417, P.37.

8) Whether the evidence is legally sufficient to sustain a verdict is a question of law. State v. Thompkins (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy of the evidence. Id. We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; State v. Conley (Dec. 16, 1993), 10th Dist. no. 93AP-387.

9) According to the state's evidence, Robert Litchfield was dropping off his brother-in-law's girlfriend, Karen Devine-Riley, at her home in Grove City on the evening of February 4, 2009. Because of icy conditions in the driveway, Litchfield parked his car partially on the road and partially in the driveway. Earlier plowing left snow banks on the side of the road, making the road narrower than was customary. Devine-Riley exited the car in order to unload firewood from the trunk.

10) Meanwhile, defendant's wife, Joan Clellan, had pulled the Clellan's truck straight into their driveway after returning home. Defendant preferred the truck to be backed into the driveway, so he went outside to turn around the truck. In order to perform the maneuver, defendant pulled the truck past Devine-Riley's driveway, turned the truck around, and then began to back it into his own driveway. in the course of backing, defendant came close to Litchfield's parked car. Defendant stopped his truck so that the front of the truck was almost even with the rear of Litchfield's car, and a verbal altercation ensued.

11) Devine-Riley testified that, upon stopping his truck, defendant began to scream profanities at her, repeatedly saying, "You're not going to assault me." (Tr. 119.) Devine-Riley assured defendant they would be only a minute and intended to move the car shortly.

12) In the course of the escalating exchange, defendant opened the door of his truck, stood on the floor of the truck between the door and the cab, and continued to scream and swear at Devine-Riley.

13) At that point, Litchfield came to the front of the truck, next to Devine-Riley, and asked, "What the f_ _ _ is your problem? Why are you screaming at her?" (Tr. 40.) Defendant then pulled a gun, pointed it at Litchfield, and said, "I'll blow your f_ _ _ing brains out." (Tr. 40.) Litchfield, who was about four feet away from defendant, feared defendant would shoot him; he was afraid he was going to die, because defendant pointed the gun at Litchfield's head. Litchfield called 911 because Devine-Riley was shaking so badly she could not dial the number. Police responded to the call and ultimately charged defendant with aggraved menacing under R.C. 2903.21(A).

13) Under the charged offense, the prosecution had the burden to prove defendant "knowingly cause[d] another to believe that [he would] cause serious physical harm to the person or property of the other person." R.C. 2903.21(A). Litchfield testified he not only feared defendant would shoot him but was afraid he would die because defendant had the gun pointed at his head.. Construed in the light most favorable to the prosecution, the evidence supports the

conclusion that defendant knowingly caused Litchfield to believe he would cause serious physical harm to Litchfield. The prosecution thus presented sufficient evidence to defeat defendant's Crim.R. 29(A) motion for acquittal and to sustain a conviction for aggravated menacing under R.C. 2903.21. Defendant's first and second assignments or error are overruled.

IV. Third Assignment of Error – Manifest Weigt of the Evidence

14) Defendant's third assignment of error asserts his conviction is against the manifest weight of the evidence. When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdit to permit reasonable minds to find guilt beyond a reasonable doubt. Conley, supra; Thompkins at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. State v. DeHass (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." State v. Raver, 10th Dist. No. 02AP-604,

2003-Ohio-958, P.21, citing State v. Antill (1964), 176 Ohio St. 61, 67.

15) Defendant's testimony differs significantly from that of Litchfield and Devine-Riley. Defendant testified that as he was backing down the street to enter his driveway, he saw Litchfield's car pull into the middle of the street and stop; the trunk opened. Defendant decided his truck could not pass the car if he remained on the street but believed he could drive his truck over the mound of snow that the earlier plowing created. While backing past Litchfield's car at "less than walking speed," defendant heard Devine-Riley say, "Wait a damn minute." (Tr. 211.) Believing Devine-Riley dropped something that rolled under his truck, defendant stopped. Devine-Riley said she would be out of the way momentarily. Defendant told her she was blocking the street, and he needed to get to his driveway. Devine-Riley said she could not hear him, so he opened the door and repeated himself, eventually standing up to continue the discussion. The exchange became unfriendly. Devine-Riley told defendant she was "sick of you damn people." and defendant responded that they were "going to settle this in court. I'm not going to argue with you about this any more." (Tr. 211.)

16) Litchfield at that point exited his car, walked up to the front of defendant's truck and said, "I'm just dropping her off, F_ _ _-face" (Tr. 212.) Defendant advised he did not care what Litchfield was doing, but Litchfield could not block the street. Litchfield then offered to "whoop

[defendant's] ass." (Tr. 212.) When defendant retorted that doing so would land Litchfield in jail, Litchfield said, "Come out of there," walked toward the open truck door, and began to shadow box and kick the fender of the truck. (Tr. 212.)

17) Believing Litchfield to be "nuts," defendant grabbed his wife's .45 pistol from the console and held it at his side, though Litchfield had begun to retreat from the truck. (Tr212-13.) Seeing the gun, Devine-Riley told Litchfield, "Now, see. Now he's got a gun." (Tr. 213.) Litchfield turned and said, "Oh, you pulled a gun on me? Now I will kill you, m_ _ _ _ _ _F _ _er." (TR. 213.) Litchfield charged the window of the truck and reached through the window of the open truck door. In response, defendant brought the gun up and used the door as a shield by placing his foot against it. When Litchfield attempted to walk around the door of the truck to get at defendant, defendant warned Litchfield to "[g]et back. You're going to get shot." (Tr. 213.) Devine-Riley was able to convince Litchfield to retreat, so defendant returned the gun to the console and sat down. Devine-Riley returned to the truck and told defendant they would call the police since he pulled a gun on them. Defendant explained he did so because Litchfield tried to pull him out

of his truck; defendant advised they must leave his truck alone.

18) Devine-Riley and Litchfield moved away from the truck, and Litchfield retrieved a cell phone. Defendant shut the door and put the truck in gear and "gassed it" toward his driveway. (Tr. 214.) Checking his mirrors to see where he was going, defendant looked up to see Devine-Riley and Litchfield chasing after his truck as he backed down the street. Running the truck aground on a pile of rocks and snow with Devine-Riley and Litchfield in pursuit, defendant saw his wife Joan coming out of the house and to the door of the truck. He handed her the gun and said, "If they come down here and try to hurt us, shoot them." (Tr. 215) Litchfield and Devine-Riley "backed off" to Litchfield's car; defendant parked his truck in the driveway. (Tr. 215.) The Clellans entered their home, slammed the door, and locked it.

19) Neither defendant's evidence not the state's evidence suggests defendant did not commit the act for which he was charged. Indeed, defendant testified that at one point he "brought the gun up" and said to Litchfield, "Get back. you're going to get shot." (Tr. 213.) Defendant's response to Devine-Riley's accusation that

he pulled a gun on someone was, "You're damn right." (Tr. 214) Instead, defendant's challenge to the manifest weight of the evidence raised issues of self-defense.

20) Defendant initially argues the jury lost its way because the prosecution never rebutted the presumption of self-defense set forth in R.C. 2901.05 (B), sometimes referred to as the "Castle Doctrine." Pursuant to the provisions of R.C. 2901.05 (B), the court instructed the jury that if it were to find by a preponderance of the evidence (1)"the defendant used defensive force," and (2) "the person against whom the defensive force was used was in the process of unlawfully and without privilege to do so, entering the residence and/or vehicle occupied by the defendant," then the jury must find the defendant acted in self-defense and enter a verdict of not guilty. (Tr. 312.) Of the two factors, only the second is disputed. The parties presented conflicting evidence about whether Litchfield was in the process of unlawfully and without privilege entering defendant's vehicle and whether defendant occupied the vehicle.

21) The prosecution, however, presented Litchfield's testimony that when defendant brandished the gun, Litchfield was at the front of the truck, four or five feet from defendant. After the defendant pulled the gun, Litchfield only backed away. When

asked if he ever recalled touching the truck, Litchfield said, "No, never touched it." (Tr . 53.) Deputy Brian Felkner also provided testimony supporting Litchfield's version of events, testifying defendant changed his story about what occurred. Defendant initially told Felkner that Litchfield tried to pull him out of his vehicle by reaching through the window. When Felkner asked defendant how he could brandish a firearm while being pulled out of the truck, defendant admitted Litchfield was not pulling him from the vehicle, but only reached into the truck's window. Confused about why Litchfield would reach into the vehicle without doing anything else, Felkner inquired further. Defendant then admitted Litchfield did not reach into the vehicle; defendant only thought Litchfield would do so.

23) Faced with such conflicting testimony, the jury the responsibility to determine witness credibility. Given the discrepancies in in testimony Litchfield and defendant offered, the jury could have reasonably found Felkner's testimony supported Litchfield's version of events and thus concluded Litchfield was not in the process of unlawfully and without privilege entering defendant's vehicle.

24) Moreover, despite defendant's claim that the uncontroverted evidence demonstrated

he was in his vehicle at all times he had the gun, some testimony indicated defendant did not occupy the truck when he possessed the gun. Litchfield testified defendant was standing on the rocker panel between the door and the cab of the truck. When asked what was above defendant's head at that point, Litchfield said, "Nothing." (Tr. 42.) Asked if defendant's head was outside of the truck, Litchfield replied affirmatively. Regarding the location from which defendant yelled profanities at her, Devine Riley stated defendant first yelled through the window. Devine-Riley then testified she was "not sure if [defendant] was standing on the running board or if he was standing on his truck, but he was taller * * * so he was kind of above the truck" when he continued yelling at her. (Tr. 118.) Both Litchfield's and Devine-Riley's testimony thus contradicts defendant's evidence that he was in his vehicle at all times. Indeed, defendant himself testified that once Litchfield and Devine-Riley were far enough away from the truck, he was able to "put the gun down on the console, and sit down." (Tr. 214.) The jury reasonably could conclude defendant was unable to stand while remaining inside the vehicle and thus also conclude defendant did not remain in the vehicle during his encounter with Litchfield and Devine-Riley.

25) Based on its resolution of the conflicting

evidence, the jury properly could refuse to apply R.C. 2901.05 (B). Defendant none the less contends the jury lost its way in failing to conclude that, apart from the "Castle Doctrine," defendant acted in self-defense.

26) Self-defense is an affirmative defense, and the burden of proof rests upon the accused. R.C. 2901.05 (A). The accused must show each of three elements in order to establish self-defense: (1) the accused was not at fault in creating the situation; (2) the accused had a bona fide belief that he or she was in imminent danger of death or great bodily harm and that the only means of escape was the use of force; (3) the accused did not violate any duty to retreat or avoid the danger. See State v. Melchior (1978), 56 Ohio St.2d 15, 20-21 (involving homicide); State v. Ward, 168 Ohio App.3d 701, 2006-Ohio-4847, P. 30 (addressing assault); State v. Ludt, 180 Ohio App.3d 672, 2009-Ohio-416, P. 21 (concerning aggravated menacing).

27) Here, the second prong of the sel-defense test defeats defendant's challenge to the manifest weight of the evidence as it relates to his contention that he acted in self-defense. Evidence in the record suggests defendant did not have a bona fide belief he was in imminent danger of death or great bodily harm. Defendant

testified he could "only assume that when [Litchfield] progressed around the outside of the door, that his intention was, indeed, to come in and get ahold of me." (Tr. 276.) When asked if Litchfield ever climbed in, defendant responded Litchfield did not. Similarly, when asked if Litchfield could have climbed in, had he wanted to, defendant replied "I don't think so." (Tr. 276.) The testimony gave the jury reason to discredit defendant's testimony, allowing the jury reasonably to conclude defendant did not believe himself to be in danger of death or great bodily harm.

28) Because the record presents a basis for the jury to find adversely to defendant on at least one of the three prongs of the self-defense test, the jury's verdict is not against the manifest weight of the evidence. The jury thus did not lose its way when it did not find defendant acted in self-defense.

29) Defendant's third assignment of error is is overruled.

V. Fourth and Fifth Assignments of Error-Ineffective Assistance of Counsel

30) To prove ineffective assistance of counsel, defendant must establish counsel's performance was deficient. Strickland v. Washington, (1984), 466 U.S. 668, 687, 104

> S. Ct. 2052, 2064. To carry that burden, the defendant must demonstrate the counsel made errors so serious that counsel was not functioning as the "counsel" the Sixth Amendment guarantees. Id. Secondly, the defendant must demonstrate the deficient performance prejudiced the defense. Id. The defense is prejudiced when the record reveals a reasonable probability that the outcome of the proceeding would have been different if not for counsel's errors. Id. at 694, 2068. Thus, the defendant must establish counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id. at 687, 2064. Unless a defendant makes both showings, the conviction cannot be said to have resulted from a breakdown in the adversary process that renders the result unreliable. Id.

31) Defendant's Fourth and Fifth Assignments of Error assert his trial counsel was ineffective in two ways: (1) his attorney failed to argue the merits of defendant's Crim. R. 29 Motion, and (2) his attorney failed to move for a judgment not withstanding the verdict. A judgment not withstanding the verdict applies in civil cases. See Civ. R. 50 (B); It is not a motion found among the criminal rules. The most nearly equivalent rule in criminal procedure is Crim. R. 29 (C), which permits a defendant to move for acquittal after verdict or discharge of jury. Defendant's two assignments of error are thus resolved under Crim. R. 29: the fourth assignment of

error under Crim R. 29 (A) and the fifth under Crim. R. 29 (C).

32) Trial counsel was not ineffective in failing to argue the merits of defendant's Crim. R. 29 (A) motion for acquittal. Because, as noted above, the state presented sufficient evidence to support the charge against defendant, trial counsel's argument would have been unavailing. Trial counsel is not ineffective for not moving for acquittal under Crim. R. 29 (A) where sufficient evidence supports a conviction. State v. Shipley, 10th Dist. No. 05AP-385, 2006-Ohio-950. Similarly, counsel is not ineffective in moving for acquittal without a supporting argument where, as here, the state presented sufficient evidence to support the charge against defendant. Defendant's fourth assignment of error is overruled.

33) Nor was trial counsel ineffective in failing to file a motion for acquittal under Crim. R. 29 (C). The same standard governs motions under both Crim. R. 29 (C) and Crim. R. 29 (A). State v. Hill, 10th Dist. No. 07Ap-889, 2008-Ohio-4257, citing State v. Beehive Ltd. Partnership (1993), 89 Ohio App.3d 718, 723. Because sufficient evidence supports defendant's conviction, defense counsel's moving for acquittal pursuant to Crim. R. 29 (C) again would have been unsuccessful.

Defendant's fifth assignment of error is overruled.

34) Having overruled defendant's five assignments of error we affirm the judgment of the trial court. Judgment affirmed.

Klatt and French, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

STATE OF OHIO,

PLAINTIFF-APPELLEE

V.

NO. 09AP-1043
(M.C. No. 2009 CRB 2626)

JOHN CLELLAN,

(Regular Calendar)

DEFENDANT-APPELLANT

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 17, 2010, and having overruled defendant's five assignments of error, it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed. Costs to assessed to defendant.

BRYANT, KLATT & FRENCH, JJ.

By _____
Judge Peggy Bryant

{B}

Memorandum Decision of February 8, 2011
Case No. 09AP-1043 online.

{C}

THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 2010-1711

V.

ENTRY

JOHN CLELLAN

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Franklin County Court of Appeals; No. 09AP1043)

s/

Maureen O'Connor
Chief Justice

{ D}

2. Copies of any written or recorded statements made by defendant, or any co-defendant, or written summaries of any oral statements made by the same to any law enforcement officer ...

* * *

6. Disclosure of any evidence known or which may become known to the Prosecuting Attorney, favorable to the defendant and material to either guilt or punishment per Criminal Rule 16(B)(1)(f)

{ E}

The Second amendment of the United States Constitution in pertinent part:

" . . . the right of the people to keep and bear arms shall not be infringed."

{F}

The Sixth amendment of the United States Constitution in pertinent part:

"In all criminal prosecutions the accused shall enjoy the right ...to have the assistance of counsel for his defense."

{G}

The Fourteenth amendment of the United States Constitution in pertinent part:

"No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

{ H }

Ohio Revised Code 2901.05, Ohio's "Castle Doctrine" in pertinent part:

"Burden and degree of proof; presumption concerning self-defense or defense of another; jury instructions concerning reasonable doubt

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence is an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(A)(1) Subject to division (B) (2) of this section, a person is presumed to have acted in self-defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without

privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2)(a) The presumption set forth in division (B) (1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b) The presumption set forth in division (B) (1) of this section does not apply if the person who uses the defensive force uses it while in a residence vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3) The presumption set forth in (B) (1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

{ I }

The Ohio Revised Code Section 2903.21 (Aggravated Menacing) provides, in pertinent part:

" (A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of another person"

{ J }

See transcript of October 6, 2009 jury trial Franklin County Municipal Court, Franklin County, Ohio

{ K }

JURY INSTRUCTIONS

SELF-DEFENSE IN A RESIDENCE OR VEHICLE

" The defendant claims he acted in self-defense or in defense of another. While the burden of proof is always on the defendant to prove self-defense, the law creates a presumption that a person acted in self-defense in certain circumstances. This means that if you find by a preponderances (sic) of the evidence that the following factors are true, you must find that the defendant acted in self-defense and must enter a verdict of acquittal.

(A). The defendant used defensive force;

(B). That the person against whom the defensive force was used was in the process of unlawfully and without privilege to do so, entering the residence and/or vehicle occupied by the defendant;

(C). 'vehicle' means a conveyance of any kind, whether or not motorized, which is designed to transport people or property;

(D). 'privilege' means any immunity, license or right conferred by law, bestowed by expressed or implied grant, arising out of a status, position, office, relationship, or growing out of necessity."

911 Transcript of February 4, 2009:

. . . 2009 at 1729 on channel 9.

DISPATCHER: 911, What's your emergency?

LITCHFIELD: Yeah, I need a sheriff or a cop out here. I'm in Darbydale.

D: What's the address of where you're at?

L: I'm on Darby Boulevard. This guy just pulled a gun on me.

D: Darby Boulevard and where? I need an address.

L: What's the address here?

(female voice): 6586.

L: 6586.

D: Tell me what happened. Who's the guy and what exactly did he do?

L: I don't know his name, but he's a neighbor to a friend of mine? I was dropping her off. I didn't want to pull down on the ice and he was leaving, so I stopped right here at the road. And then he backed up and almost hit her, and then jumped out and started running his mouth. And I said – you know, I went up to him and I said, if you want to run your

mouth, you know, whatever. Then he pulled a gun out on me.

D: Do you know where he lives at?

L: He's giving the gun to his wife and he said if I try anything, shoot me.

D: Are they there now?

L: Yes, he's here now.

(female voice): He did nothing; nothing.

L: She's saying ---- she's saying I was trying to drag him out of the truck.

(female voice): You're lying. you're making up stories.

D: O.K. 6586 Darby, right?

L: Yes.

D: O.K. O.K. What he said - - he got mad at you. He pulled a gun on you, then he gave it to his wife and told her to shoot you?

L: Yeah. When he first pulled the gun - - -

D: Is he in the car?

L: He was in the car.

D: What kind of car?

L: It's a red, Chevy pickup. The gun looks like a .45. It's a automatic. And he said he was going to shoot me, was going to blow my brains out. Then he gave the gun to his wife and told her if I do anything for her to shoot me. But he's still running his mouth to me.

D: O.K. Are you in a vehicle, too?

L: Yes, I was in a vehicle. And I got eight-year-old daughter - - -

(female voice): And my seven-year-old daughter.

L: and her seven-year-old girl at the house.

D: O.K. He's in a red, Chevy pickup and he's got a 45 millimeter gun; is that correct? He is currently now threatening to blow your brains out?

L: Yes. Then he gave the gun to his wife and told his wife if I do anything stupid to shoot me.

D: Is she in the vehicle with him?

L: No. They went right back in their house, cause he could back - - he backed all the way back up into the driveway.

D: And their house is 6586 or is that yours?

L: That's ours, 6586.

D: So where did they go?

L: It's at the dead end of the street and they live right beside them.

D: So it's the dead end of Darbydale?

L: Yeah - - or it's Darby Boulevard.

D: O.K. We're on the way. O.K?

L: O.K.

D: All right.

{M}

Defendant, John Clellan
On 2-4-09 at approx. 17:29 hrs., I responded to a report of a man w/ a gun at 6586 Darby Blvd. Grove City, Ohio. When arrived I made contact with the victims Robert L. Litchfield and Karen Devine/Riley. Both victims stated that they had a verbal argument with Mr. John Clellan who resides at 6574 Darby Blvd. over a parking issue in the roadway of Darby Blvd. Victim Mr. Litchfield stated that during the argument, a brandished a handgun from his waist band area and stated "I'll kill your ass." The defendant' s wife, Joan Clellan, then came out of the residence. Mr. Clellan then handed the weapon to Mrs. Clellan then pointed the weapon at Mr. Litchfield while Mr. Clellan moved his vehicle in to his driveway. Both Mr. and Mrs. Clellan then retreated inside their home while Ms. Devine-Riley called 911. After speaking to Mr. Litchfield both Mr. and Mrs. Clellan then came out of the house. Both suspects were taken into custody at that time. Once seated, Mr. Clellan was mirandized and stated first that Mr. Litchfield attempted to "pull him from his vehicle." Mr. Clellan then later stated that Mr. Litchfield did not attempt to get him from the vehicle. Both suspects were arrest and transported to 370 S. Front Street for slating.

RECORD AND BRIEFS

FILED
MAY 25 2011
OFFICE OF THE CLERK

No. 10-1313

In The
Supreme Court of the United States

JOHN CLELLAN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Ohio, Franklin County

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITY OF COLUMBUS, OHIO
DEPARTMENT OF LAW
RICHARD C. PFEIFFER, JR. (0021982)
City Attorney

LARA N. BAKER (0063721)
City Prosecutor

MELANIE R. TOBIAS (0070499)
Director, Appellate Unit

ORLY AHRONI (0063174)
Counsel of Record
Assistant City Prosecutor
375 South High Street
Columbus, Ohio 43215-4530
(614) 645-8086
orahroni@columbus.gov

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

QUESTIONS PRESENTED FOR REVIEW

1. Were Petitioner's due process rights violated when a recording that may have recorded events at the scene of the offense after the crime had been committed was lost or destroyed by police and Petitioner does not allege bad faith? Was Petitioner's trial counsel ineffective for not raising this issue at trial and was appellate counsel ineffective for not raising this issue on direct appeal to the Ohio Appellate Court?

2. Was Petitioner's trial counsel ineffective by failing to object when the prosecutor disclosed Petitioner's statement to defense counsel at trial during the state's case-in-chief but prior to Petitioner's testimony?

3. Assuming the trial court incorrectly instructed the jury on the Castle Doctrine, does this improper instruction rise to the level of violating Petitioner's constitutional rights and does this argument raise an important federal question? Was trial counsel ineffective for not objecting to the jury instruction?

4. Should this Court clarify legal terms in a state statute even though such action does not raise an important federal question?

5. Do Ohio's laws deny Petitioner the right to defend himself?

6. Should Petitioner's conviction be overturned because his co-defendant in a joint trial was acquitted?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
OBJECTIONS TO THE JURISDICTION OF THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
A. Background	4
B. Proceedings Below	6
REASONS FOR DENYING THE PETITION	8
I. Petitioner's due process rights were not violated when a recording was lost or destroyed; the lost or destroyed recording could only be characterized as potentially useful evidence, and Petitioner failed to show bad faith on the part of the police in not preserving this recording	8
II. Petitioner has failed to prove that his statement met all three prongs of the *Brady* test; thus, he is unable to show that his trial counsel was ineffective for not objecting when his statement was disclosed to defense counsel during trial	14

TABLE OF CONTENTS – Continued

Page

III. The trial court properly instructed the jury on the Castle Doctrine; assuming this instruction was incorrect, the incorrect instruction does not rise to the level of violating Petitioner's constitutional rights and does not raise an important federal question 19

IV. Federal courts may not review state-court interpretations of state law 22

V. Ohio laws do not deny Petitioner the right to defend himself 22

VI. Inconsistent jury verdicts among multiple defendants in a joint trial do not provide grounds for overturning a jury verdict 23

CONCLUSION 26

APPENDICES

Appendix A: Memorandum Decision of the Court of Appeals of Ohio, Tenth Appellate District, Corrected ¶8 ..... App. 1

Appendix B: Jury instruction regarding the Castle Doctrine under Ohio Revised Code § 2901.05(B) ..... App. 2

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Youngblood, 488 U.S. 51 (1988).....9, 10

Banks v. California, 395 U.S. 708 (1969) 3

Brady v. Maryland, 373 U.S. 83 (1963) .....*passim*

California v. Trombetta, 467 U.S. 479 (1984).....9

Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) 16

Castille v. Peoples, 489 U.S. 346 (1989).....2

Dunn v. United States, 284 U.S. 390 (1932).....23, 24

Estelle v. McGuire, 502 U.S. 62 (1991) 20, 22

Foster v. Ward, 182 F.3d 1177 (10th Cir. 1999) 16

Giglio v. United States, 405 U.S. 150 (1972) 15

Harris v. Rivera, 454 U.S. 339 (1981).....23, 24

Illinois v. Fisher, 540 U.S. 544 (2004) 9, 10, 11

Ransom v. Johnson, 126 F.3d 716 (5th Cir. 1997) 18

Rios-Delgado v. United States, 117 F. Supp. 2d 581 (W.D. Tex. 2000) 18

Rose v. Johnson, 141 F. Supp. 2d 661 (S.D. Tex. 2001) 18

Strickland v. Washington, 466 U.S. 668 (1984).....8, 9

Strickler v. Greene, 527 U.S. 263 (1999) 15

United States v. Acosta, 17 F.3d 538 (2nd Cir. 1994) 24

United States v. Agurs, 427 U.S. 97 (1976).....15

TABLE OF AUTHORITIES – Continued

Page

United States v. Andrews, 850 F.2d 1557 (11th Cir. 1988) 24

United States v. Branch, 537 F.3d 582 (6th Cir. 2008) 10

United States v. Dotterweich, 320 U.S. 277 (1943) 23

United States v. Edwards, 442 F.3d 258 (5th Cir. 2006) 15

United States v. Femia, 9 F.3d 990 (1st Cir. 1993) 11, 12

United States v. Higgs, 713 F.2d 39 (3rd Cir. 1983) 15

United States v. Jobson, 102 F.3d 214 (6th Cir. 1996) 11, 12

United States v. Jumah, 599 F.3d 799 (7th Cir. 2010) 16

United States v. McKinney, 758 F.2d 1036 (5th Cir. 1985) 15

United States v. Parker, 72 F.3d 1444 (10th Cir. 1995) 11, 12

United States v. Powell, 469 U.S. 57 (1984) 23, 24, 25

United States v. Patterson, 348 F.3d 218 (7th Cir. 2003) 24

United States v. Word, 806 F.2d 658 (6th Cir. 1986) 15

TABLE OF AUTHORITIES – Continued

Page

Weatherford v. Bursey, 429 U.S. 545 (1977) 14

Wisconsin v. Mitchell, 508 U.S. 476 (1993).....22

STATUTES

Ohio Revised Code § 2901.05(B) 3, 20, 21

Ohio Revised Code § 2903.21(A) 6

28 U.S.C. § 1254 1

28 U.S.C. § 1257(a).....1, 3

RULES

Ohio Rule of Appellate Procedure 26(B).....2

S.Ct. Prac. R. 2.1(A)(2) 2, 3, 7

S.Ct. Prac. R. 3.6.....3

OPINIONS BELOW

The citation of the unpublished opinion of the Court of Appeals of Ohio, Tenth Appellate District, (Pet. App. A), is *State v. Clellan*, 10th Dist. No. 09AP-1043, 2010 Ohio 3841, 2010 Ohio App. LEXIS 3248. The unpublished entry from the Supreme Court of Ohio declining jurisdiction and dismissing the appeal (Pet. App. C) can be found at the Supreme Court of Ohio's website http://www.sconet.state.oh.us. The unpublished memorandum decision denying Petitioner's application for reopening issued by the Court of Appeals of Ohio, Tenth Appellate District, (Pet. App. B), can be found at the Franklin County Clerk of Courts website http://fcdcfcjs.co.franklin.oh.us/CaseInformationOnline. Enter case no. 09AP1043.

OBJECTIONS TO THE JURISDICTION OF THIS COURT

Petitioner incorrectly claims jurisdiction under 28 U.S.C. § 1254 which provides Sup eme Court review, by way of Writ of Certiorari, of decisions of circuit court of appeals. Because Petitioner is appealing a decision from a state court, the jurisdiction of this Court rests on 28 U.S.C. § 1257. 28 U.S.C. § 1257(a) provides, in pertinent part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari[.]"

Petitioner appeals the decision of the Supreme Court of Ohio which declined jurisdiction to hear his case. Pet. App. C. In Petitioner's memorandum in support of jurisdiction to the Supreme Court of Ohio, Petitioner raised new arguments that were not presented on direct appeal to the Court of Appeals of Ohio, Tenth Appellate District. These new arguments are contained in his petition for a writ of certiorari. The arguments Petitioner made in the Ohio Court of Appeals on direct appeal are not in his petition. See Pet. App. A. It is well-established that the presentation of claims for the first time on discretionary review to the state's highest court does not constitute fair presentation for exhaustion purposes. *Castille v. Peoples*, 489 U.S. 346 (1989).

Petitioner is also appealing a memorandum decision of the Court of Appeals of Ohio, Tenth Appellate District, which denied Petitioner's application to reopen his appeal. Pet. App. B. The Ohio Rules of Appellate Procedure, specifically App.R. 26(B), permits applications for reopening an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. Pet. App. B-1. If a defendant's application for reopening is denied, the Rules of Practice of the Supreme Court of Ohio states that a defendant may appeal the decision of the court of appeals to the Supreme Court of Ohio. See S.Ct. Prac. R. 2.1(A)(2) ("an appeal from the decision of a court of appeals under App.R. 26(B) in a noncapital case [ ] may invoke the appellate jurisdiction of the Supreme Court and shall be designated a

claimed appeal of right. In accordance with S.Ct. Prac. R. 3.6, the Supreme Court will determine whether to accept the appeal.") Thus, the decision of the Ohio Court of Appeals denying Petitioner's application for reopening was not a "final judgment . . . rendered by the highest court of a State in which a decision could be had . . . " See 28 U.S.C. § 1257(a); S.Ct. Prac. R. 2.1(A)(2); *Banks v. California*, 395 U.S. 708 (1969).

To invoke the jurisdiction of this court, Petitioner was required to appeal the denial of his application for reopening to the Supreme Court of Ohio in order for the application to be considered a final judgment under 28 U.S.C. § 1257(a). Petitioner failed to do so. Because Petitioner failed to appeal to the Supreme Court of Ohio the decision of the Ohio Court of Appeals denying his application for reopening, the jurisdiction of this Court is not invoked, and this Court should decline to review the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ohio Revised Code § 2901.05(B): see Petitioner's Appendix H, but subsection (A)(1) should state (B)(1).

STATEMENT OF THE CASE

A. Background

On February 4, 2009, an argument arose between Petitioner and Robert Litchfield concerning Litchfield's parked car, which partially blocked Petitioner's path to his driveway. Pet. App. A-1. Litchfield was dropping off his brother-in-law's girlfriend, Karen Devine-Riley, at her home. Because of the icy and snowy conditions, Litchfield parked his car partially on the road and partially in Petitioner's driveway. Devine-Riley exited the car in order to unload firewood from the trunk. Pet. App. A-4.

Meanwhile, Petitioner's wife, Joan Clellan, had pulled Petitioner's truck straight into the driveway after returning home. Petitioner preferred the truck to be backed into the driveway, so he went outside to turn the truck around. In order to perform this maneuver, Petitioner pulled his truck past Devine-Riley's driveway, turned the truck around, and then began to back it into his own driveway. In the course of backing, Petitioner came close to Litchfield's parked car. Petitioner stopped his truck so that the front of the truck was almost even with the rear of Litchfield's car, and a verbal altercation ensued. Pet. App. A-4.

Upon stopping his truck, Petitioner began to scream profanities at Devine-Riley. Devine-Riley assured Petitioner they intended to move the car shortly. Pet. App. A-4. Petitioner opened the door of his truck, stood on the floor of the truck between the door and

the cab, and continued to scream and swear at Devine-Riley. Pet. App. A-5.

At that point, Litchfield came to the front of the truck, next to Devine-Riley, and asked, "What the fuck is your problem? Why are you screaming at her?" Petitioner pulled a gun, pointed it at Litchfield, and said, "I'll blow your fucking brains out." Litchfield, who was about four feet away from Petitioner, feared Petitioner would shoot him. He was afraid he was going to die, because Petitioner pointed the gun at Litchfield's head. Litchfield called 911 because Devine-Riley was shaking so badly she could not dial the number. Pet. App. A-5.

Petitioner did not dispute that he "brought the gun up" and said to Litchfield, "Get back. You're going to get shot." Pet. App. A-9. However, Petitioner claimed that he was defending himself. Pet. App. A-10. Petitioner testified that Litchfield offered to "whoop [Petitioner's] ass". Pet. App. A-7 to A-8. After Petitioner grabbed his wife's gun from the console, Litchfield turned and said, "Oh, you pulled a gun on me? Now I will kill you, mother-fucker." Petitioner testified that Litchfield reached through the window of Petitioner's open truck door, and, failing that, began to walk around the truck door. In response, Petitioner brought the gun up and warned Litchfield to get back and that he was going to get shot. Pet. App. A-8.

Deputy Brian Felkner, who responded to the 911 call, testified that Petitioner changed his story about

what occurred. Pet. App. A-5, A-11. Petitioner initially told Felkner that Litchfield tried to pull him out of his vehicle. Petitioner later admitted Litchfield was not pulling him from the vehicle, but only reached into the truck's window. After further inquiry, Petitioner admitted Litchfield did not reach into the vehicle; Petitioner only thought Litchfield would do so. Litchfield also testified that when Petitioner brandished the gun, Litchfield was at the front of the truck, four or five feet from Petitioner. After Petitioner pulled the gun, Litchfield backed away. Litchfield stated that he never touched the truck. Pet. App. A-11.

B. Proceedings Below

Petitioner was charged with aggravated menacing under Ohio Revised Code § 2903.21(A) which alleged that Petitioner "knowingly cause[d] another to believe that [he would] cause serious physical harm to the person or property of the other person." Pet. App. A-5. The jury was instructed on self-defense as a presumption, otherwise known as the Castle Doctrine, and self-defense as an affirmative defense. Pet. App. A-10, A-13. Petitioner was found guilty as charged. Pet. App. A-1.

Petitioner appealed his conviction to the Ohio Court of Appeals, Tenth Appellate District. Pet. App. A. The Ohio Court of Appeals affirmed his conviction. Pet. App. A-18. Petitioner filed a memorandum in support of jurisdiction in the Supreme Court of Ohio. For the first time, the federal questions sought to be

reviewed herein were raised. The Supreme Court of Ohio declined jurisdiction to hear the case and dismissed the appeal as not involving any substantial constitutional question. Pet. App. C.

Petitioner also filed an application to reopen his appeal in the Ohio Court of Appeals alleging ineffective assistance of counsel. In the application, Petitioner raised the first three questions sought to be reviewed in his petition for a Writ of Certiorari. Pet. App. B-2 to B-3. The last three questions in the petition herein were not raised in the application. The Ohio Court of Appeals denied the application for reopening. Pet. App. B. Petitioner did not appeal the decision of the court of appeals denying his application for reopening to the Supreme Court of Ohio as permitted under S.Ct. Prac. R. 2.1(A)(2). Although the decision of the Ohio Court of Appeals denying Petitioner's application was not a final judgment rendered by the highest court of a State which would invoke this Court's jurisdiction, Respondent will proceed to address why this Court should deny the petition for a Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. Petitioner's due process rights were not violated when a recording was lost or destroyed; the lost or destroyed recording could only be characterized as potentially useful evidence, and Petitioner failed to show bad faith on the part of the police in not preserving this recording.

Petitioner is unable to show that his trial counsel and appellate counsel on direct appeal to the Ohio Court of Appeals were ineffective for not raising the issue of a lost or destroyed police cruiser video recording. The recording may have recorded events at the scene of the offense after the crime already had been committed. Thus, the lost or destroyed recording can only be characterized as potentially useful evidence, and Petitioner is unable to show bad faith on the part of the police in failing to preserve this recording. Thus, Petitioner is unable to show that his counsel's failure to raise this issue at trial or on direct appeal to the Ohio Court of Appeals amounted to ineffective assistance of counsel.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court recognized a two-part test for determining whether a criminal defendant was denied the effective assistance of counsel. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient

performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Id.

This Court has held that the Due Process Clause requires the state to disclose material exculpatory evidence to the defense which is in the government's possession. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The *Brady* rule extends to material exculpatory evidence which is lost or destroyed. *California v. Trombetta*, 467 U.S. 479, 489 (1984). To be materially exculpatory, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489. "[W]hen the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld." *Illinois v. Fisher*, 540 U.S. 544, 547 (2004), citing *Brady v. Maryland*, 373 U.S. 83 (1963).

However, it is well-established that if the evidence in question is not materially exculpatory, but only potentially useful, the defendant must show bad faith on the part of the state in order to demonstrate a due process violation. *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988). "[U]nless a criminal defendant

can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Id. at 58. Evidence is potentially useful if "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Id. at 57.

The existence of a pending discovery request does not eliminate the necessity of showing bad faith on the part of police. *Illinois v. Fisher*, 540 U.S. 544, 548 (2004). Furthermore, negligence, even gross negligence, on the part of the government in failing to preserve potentially useful evidence does not constitute bad faith. *Youngblood*, 488 U.S. at 58; *United States v. Branch*, 537 F.3d 582, 590 (6th Cir. 2008).

In *Youngblood*, this Court considered the police's failure to preserve blood and semen samples taken from a rape victim. A police criminologist had conducted an initial review of the samples, but the state failed to preserve the samples by refrigeration so that the defendant could conduct his own tests. 488 U.S. at 53-54. This Court found that the evidence was potentially useful, and the defendant did not establish a due process violation because the actions of the police could "at worst be described as negligent." Id. at 58.

The issue again arose in *Illinois v. Fisher*. In *Fisher*, the defendant, who was charged with possession of cocaine, filed a discovery motion requesting all physical evidence, including cocaine, which the state

intended to use at trial. *Fisher*, 540 U.S. at 545. Before the cocaine was provided to the defendant, the defendant failed to appear in court and became a fugitive. Id. When he was captured ten years later, the state reinstated the cocaine possession charges but had, in accordance with established procedures, destroyed the cocaine. Id. at 546. This Court concluded that the cocaine was only potentially useful evidence and that there was no due process violation because the defendant did not allege that the police acted in bad faith. Id. at 547-48.

In situations similar to the case at bar, federal courts, citing to this Court's well-established precedent, have found tape recordings that were destroyed by the state to be potentially useful evidence as opposed to material exculpatory evidence. See *United States v. Parker*, 72 F.3d 1444 (10th Cir. 1995); *United States v. Femia*, 9 F.3d 990 (1st Cir. 1993); *United States v. Jobson*, 102 F.3d 214 (6th Cir. 1996). In *Parker*, a state trooper accidentally erased footage of a traffic stop he conducted. The stop eventually led to a search of the car that uncovered narcotics. Id. at 1448. The Tenth Circuit held that the videotaped evidence was potentially useful evidence and explained, "the only way the erased video tape evidence could be 'apparently' exculpatory is if it demonstrated that the events did not occur as [the trooper] related, that is, that he was lying about the events[.]" Id. at 1452. And, "[w]hether [the trooper] was telling the truth was essentially a question of credibility for the district court." Id. The Tenth Circuit further held

that the defendants failed to demonstrate bad faith on the part of the government in destroying the potentially useful evidence, and mere negligence was not sufficient to establish that the trooper acted in bad faith. Id.

In *Femia*, the First Circuit found that the government's destruction of tape recordings of conversations between the defendant and his alleged coconspirators could only be characterized as potentially exculpatory evidence. Because the tapes were destroyed due to the government's gross negligence, and not bad faith, the defendant was unable to show that his due process rights were violated. Id. at 995. Similarly, the Sixth Circuit in *Jobson* held that the destruction of a radio dispatch tape made during defendant's arrest was potentially exculpatory evidence. Moreover, the Court stated "[w]hile we disapprove of the government's dilatory response to defendant's discovery requests, we cannot say that it acted in bad faith. * * * The tape was erased not as a result of malice, but routine police department policy. Though the government was negligent, perhaps even grossly negligent, in failing to preserve the tape, there is no evidence that it acted in bad faith." Id. at 218.

Like the tapes in the federal cases cited above, the tape recording in this case could only be characterized as potentially useful evidence. Here, a deputy responded to the scene of the offense after the victim of the aggravated menacing charge called the police. Pet. App. A-5. After being arrested, Petitioner made comments to the deputy about his version of events.

Pet. App. A-11, B-3. The deputy's cruiser was equipped with a video camera but the video was not preserved. Pet. App. B-3.

On an application to reopen his appeal filed by Petitioner in the Court of Appeals of Ohio, Tenth Appellate District, the state appellate court reasonably concluded that the evidence was potentially useful since the recording occurred after the crime had been committed. Pet. App. B-4. "Because the video did not capture the activity giving rise to the aggravated menacing charge, but only post-incident police activity on arriving at the scene, it does not address the substance of the charge other than through comments of witnesses who were available for trial." Pet. App. B-3, B-4. Thus, the state appellate court held that Petitioner must show bad faith on the part of the police in order to demonstrate a due process violation. Petitioner did not suggest bad faith. Pet. App. B-4. Additionally, Petitioner does not suggest bad faith in his petition for a writ of certiorari. Furthermore, the deputy testified at trial and was subject to cross-examination regarding the lost recording, and Petitioner testified regarding his version of events.

Because the recording is potentially useful evidence and Petitioner has not shown bad faith on the part of the police in failing to preserve this recording, no due process violation occurred. Therefore, Petitioner cannot show that his trial and appellate counsel were ineffective for not raising this issue at trial or on direct appeal to the Ohio Court of Appeals. Furthermore, Petitioner has failed to show that the

state court decided an important federal question in a way that conflicts with relevant decisions of this Court. For these reasons, this Court should deny Petitioner's Writ of Certiorari.

II. Petitioner has failed to prove that his statement met all three prongs of the *Brady* test; thus, he is unable to show that his trial counsel was ineffective for not objecting when his statement was disclosed to defense counsel during trial.

Petitioner is unable to show that his trial counsel was ineffective for not objecting when the prosecutor, during the testimony of the state's first witness, disclosed to defense counsel a statement made by Petitioner. It is well-settled that there is no general constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Nevertheless, certain types of evidence must be disclosed by the prosecution in order to safeguard a defendant's due process rights. This Court held that due process requires the prosecution to disclose evidence favorable to an accused when such evidence is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is material if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. A reasonable probability means one sufficient to undermine confidence in the outcome. Id.

The prosecutor's duty of disclosure under *Brady* includes evidence which is exculpatory and that which

could be used to impeach government witnesses. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). Thus, there are three components of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

The *Brady* rule applies to "the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense." [Emphasis added.] *United States v. Agurs*, 427 U.S. 97, 103 (1976). Moreover, federal courts have held that a *Brady* violation does not occur if previously undisclosed evidence is disclosed during trial unless the defendant is prejudiced by the delay in disclosure. *United States v. Word*, 806 F.2d 658, 665 (6th Cir. 1986). See also *United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985) ("the inquiry is whether the defendant was prejudiced by the tardy disclosure. If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been."); *United States v. Higgs*, 713 F.2d 39, 44 (3rd Cir. 1983) (holding that where *Brady* material merely has impeachment value, disclosure on the day the witness testifies satisfied due process).

The petitioner bears the burden of establishing a *Brady* violation. *United States v. Edwards*, 442 F.3d

258, 267 n.9 (5th Cir. 2006); *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000); *United States v. Jumah*, 599 F.3d 799, 808-09 (7th Cir. 2010); *Foster v. Ward*, 182 F.3d 1177, 1191 (10th Cir. 1999). Here, Petitioner has not met this burden because he cannot establish that all three prongs of the *Brady* test were met. Under the first prong of *Brady*, the Ohio Court of Appeals could not determine whether Petitioner was prejudiced by the state's failure to produce the statement earlier in the proceedings since the nature of the statement and its content was unknown. App., *infra*, A at ¶8.[1] The first witness the prosecution called to testify in the state's case-in-chief was the victim of the offense. During the victim's testimony, the prosecutor advised the court the following:

> MR. STEINBERG: I just want to put on the record that a long time ago we conducted discovery and my understanding was that we would make copies of everything for defense counsel, and defense counsels been very - both counsels have been very open with us, so we had a conversation about a report, and from our perspective, recopied that or allowed defense counsel to recopy that report. So I think from our perspective, we have nothing left, but I want to put that on the record.

---

[1] Petitioner's reproduction of paragraph 8 of the Memorandum Decision of the Court of Appeals of Ohio, Tenth Appellate District, is inaccurate. The correct language is reproduced in Respondent's Appendix, *infra*, A.

> THE COURT: Anything from the defense?
>
> MR. SHERMAN: Well, I think, Your Honor, what he's trying to say, and I – for some reason, they had a statement – purported statement from our clients that we had not gotten until today, through, I'm sure, just either inadvertence or omission, when Steve gave us everything. We got that report today. We're fine. We're not going to make any issue of it. He's been a total gentleman throughout not only the trial portion, but the whole portion. He's a great gentleman, and I have nothing but regard for him as a lawyer.
>
> MR. STEINBERG: Thank you.
>
> MR. SHERMAN: Additionally, I think this got lost in the shuffle.

Tr. 77-78. As shown by the above exchange between the prosecution and defense, the record is unclear as to the nature of Petitioner's statement. Thus, Petitioner cannot show that the evidence was favorable to the accused under the first *Brady* prong.

Under the second *Brady* prong, Petitioner's statement was not suppressed because it was disclosed to the defense during trial, not after trial. Lastly, under the third *Brady* prong, Petitioner has not shown that prejudice ensued by Petitioner's statement being disclosed during trial as opposed to before trial. Petitioner asserts that the statement at issue was a statement Petitioner gave to the deputy wherein Petitioner allegedly stated that the victim did not

reach into Petitioner's vehicle and that Petitioner only thought the victim would do so. However, as previously noted, the record is insufficient to determine the nature of Petitioner's statement.

Assuming the record is sufficient to show that the disputed statement was a statement given by Petitioner to the deputy, Petitioner is unable to show prejudice. The prosecutor disclosed Petitioner's statement to defense counsel prior to the testimony of both the deputy and Petitioner. Thus, Petitioner was aware of the nature of the statement prior to testifying and prior to defense counsel cross-examining the deputy.

In addition, defense counsel's decision not to object when Petitioner's statement was disclosed during trial "falls squarely within the ambit of trial strategy." See, e.g., *Rios-Delgado v. United States*, 117 F. Supp. 2d 581, 589 (W.D. Tex. 2000) ("Generally speaking, a failure to object, standing alone, does not rise to the level of constitutionally deficient performance. In cases where an accused complains that counsel was ineffective because he did not object to something . . . , the courts grant significant deference, as such actions fall squarely within the ambit of trial strategy.") Moreover, "[t]actical and strategical decisions of counsel if based on informed and reasoned practical judgment will not be second-guessed." *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997). Courts will not find ineffective assistance of counsel merely because of a disagreement with counsel's trial strategy. *Rose v. Johnson*, 141 F. Supp. 2d 661, 687 (S.D. Tex. 2001).

Because Petitioner has not met his burden of establishing a *Brady* violation, Petitioner cannot show that his trial counsel was ineffective for not objecting to the disclosure of his statement during trial. Furthermore, Petitioner has failed to show that the state court decided an important federal question in a way that conflicts with relevant decisions of this Court. For these reasons, this Court should deny Petitioner's Writ of Certiorari.

III. The trial court properly instructed the jury on the Castle Doctrine; assuming this instruction was incorrect, the incorrect instruction does not rise to the level of violating Petitioner's constitutional rights and does not raise an important federal question.

The Castle Doctrine instruction that the trial court provided to the jury was not erroneous.[2] Assuming the instruction was incorrect, the erroneous instruction does not rise to the level of a constitutional violation. The jury instruction at issue arises from a state statute that gives a defendant a presumption of self-defense under certain circumstances when using defensive force that is intended or likely to cause

---

[2] The jury instruction contained in Petitioner's Appendix, K, does not properly recite the entire Castle Doctrine instruction provided to the jury by the trial court. The entire jury instruction on the Castle Doctrine provided by the trial court is contained in Respondent's Appendix, *infra*, B.

death or great bodily harm to another. See Ohio Revised Code § 2901.05(B), Pet. App. H-2. This state statute is also known as the Castle Doctrine.

Whether a jury instruction under the Castle Doctrine was properly given is a matter of state law and does not raise an important federal question. In the context of federal habeas actions, this Court has held, "the fact that the [jury] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id. at 67-68. Thus, an erroneous jury instruction warrants habeas corpus relief only where the instruction "so infected the entire trial that the resulting conviction violates due process." Id. at 72. "It must be established not merely that the instruction is undesirable, erroneous, or even universally condemned, but that it violated some constitutional right." Id. The jury instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. Id. Additionally, the court must inquire whether there is a reasonable likelihood that the jury had applied the challenged instruction in a way that violates the Constitution. Id.

The Castle Doctrine under Ohio Revised Code § 2901.05(B)(1) provides, in pertinent part, that a

person is presumed to have acted in self defense if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering the vehicle occupied by the person using defensive force. This presumption is a rebuttable presumption and may be rebutted by a preponderance of the evidence. Ohio Revised Code § 2901.05(B)(3).

Petitioner takes issue with the fact that the trial court did not instruct the jury on two circumstances in which a defendant is *not presumed* to have acted in self-defense: (1) when the person against whom force is used has a right to be in the vehicle, and (2) when the person who uses the force is unlawfully in the vehicle. Pet. App. B-5. No evidence was presented that the person against whom force was used had a right to be in Petitioner's vehicle or that Petitioner was unlawfully in the vehicle. Thus, the trial court was not required to instruct on matters which were not applicable to the facts of the case, as correctly noted by the Ohio Court of Appeals. Pet. App. B-5. Consequently, Petitioner's trial counsel did not render ineffective assistance of counsel by not objecting to the trial court's jury instruction on the Castle Doctrine, and his appellate counsel was not ineffective by not raising this issue on direct appeal to the Ohio Court of Appeals. Furthermore, Petitioner has failed to show that the state court decided an important federal question. For these reasons, this Court should deny Petitioner's Writ of Certiorari.

IV. Federal courts may not review state-court interpretations of state law.

Petitioner's argument that this court should grant his petition for a writ of certiorari in order to clarify legal terms under the Castle Doctrine should be rejected. This argument does not involve an important question of federal law. Additionally, in the context of habeas review, this Court has stated that a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. *Estelle v. McGuire*, 502 U.S. at 67-68. Federal courts may not review state-court interpretations of state law. Id. Also, federal courts are bound by a state court's construction of a state statute. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). Thus, this Honorable Court should deny Petitioner's Writ of Certiorari.

V. Ohio laws do not deny Petitioner the right to defend himself.

Petitioner's argument that Ohio laws deny him the right to defend himself disregards Ohio's self-defense statutes. At Petitioner's trial, the court gave to the jury both of Petitioner's requested instructions on self-defense. The jury was instructed on self-defense as a presumption and self-defense as an affirmative defense. Pet. App. A-10, A-13. The jury did not find that Petitioner's actions constituted self-defense. The Ohio appellate court reviewed the record and found that there was sufficient evidence to sustain Petitioner's conviction for aggravated menacing.

Pet. App. A-6. The appellate court also found that the jury did not lose its way when it did not find that Petitioner acted in self-defense. Pet. App. A-14. Thus, this Honorable Court should deny Petitioner's Writ of Certiorari.

VI. Inconsistent jury verdicts among multiple defendants in a joint trial do not provide grounds for overturning a jury verdict.

Petitioner's argument that his conviction for aggravated menacing should be vacated because his co-defendant was acquitted on the same charge disregards a long line of United States Supreme Court precedent which provides that inconsistent verdicts are not subject to reversal merely because they are inconsistent. *Dunn v. United States*, 284 U.S. 390, 393 (1932); *United States v. Dotterweich*, 320 U.S. 277, 279 (1943); *Harris v. Rivera*, 454 U.S. 339, 345-48 (1981); *United States v. Powell*, 469 U.S. 57 (1984). The Equal Protection Clause does not protect against inconsistent verdicts by juries or judges. *Dotterweich*, 320 U.S. at 279; *Harris v. Rivera*, 454 U.S. at 345, 348. Furthermore, verdicts that treat co-defendants in a joint trial inconsistently are not a sufficient reason for setting the verdict aside. *Harris v. Rivera*, 454 U.S. at 345, citing *Dotterweich*, 320 U.S. at 279. Even assuming that a co-defendant's acquittal is logically inconsistent with a defendant's conviction, a defendant, who is found guilty beyond a reasonable doubt after a fair trial, has no constitutional ground

to complain that his co-defendant was acquitted. *Harris v. Rivera*, 454 U.S. at 348.

Federal courts, citing to this Court's well-established law, have upheld inconsistent verdicts against co-defendants rendered by the same jury. See *United States v. Acosta*, 17 F.3d 538, 544-45 (2nd Cir. 1994) ("[e]ven assuming that the verdict against [defendant] was inconsistent with the verdicts as to his codefendants, we find no basis for relief, for it has long been established that inconsistency in jury verdicts of guilty on some counts and not guilty on others is not a ground for reversal of the verdicts of guilty"); *United States v. Patterson*, 348 F.3d 218, 225 (7th Cir. 2003) ("[t]his court has held that the reasoning of *Powell* and *Dunn* applies with equal force to cases where inconsistent verdicts are rendered against co-defendants on conspiracy charges"); *United States v. Andrews*, 850 F.2d 1557, 1561 (11th Cir. 1988) ("[c]onsistent verdicts are unrequired in joint trials for conspiracy: where all but one of the charged conspirators are acquitted, the verdict against the one can stand. The compelling rationale of *Dunn* and its progency [sic], including *Powell*, brings us to this conclusion.")

Moreover, this Court held that review for sufficiency of the evidence provides adequate protection against any problem caused by inconsistent jury verdicts. "[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems

caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt." *Powell*, 469 U.S. at 67.

In the case sub judice, the Ohio Court of Appeals reviewed the record and held that Petitioner's conviction for aggravated menacing was supported by sufficient evidence. Pet. App. A-6. Because the law on inconsistent verdicts is well-settled, and Petitioner has not demonstrated that the state court decided an important federal question in a way that conflicts with relevant decisions of this Court, this Honorable Court should deny Petitioner's Writ of Certiorari.

CONCLUSION

Petitioner does not raise important questions of federal law, and Petitioner has not demonstrated that the Ohio Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CITY OF COLUMBUS, OHIO
DEPARTMENT OF LAW
RICHARD C. PFEIFFER, JR.
(0021982)
City Attorney

LARA N. BAKER (0063721)
City Prosecutor

MELANIE R. TOBIAS (0070499)
Director, Appellate Unit

ORLY AHRONI (0063174)
Counsel of Record
Assistant City Prosecutor
375 South High Street
Columbus, Ohio 43215-4530
(614) 645-8086

Counsel for Respondent

APPENDIX A

The Memorandum Decision of the Court of Appeals of Ohio, Tenth Appellate District, is reproduced in its entirety in Petitioner's Appendix B with the exception that paragraph 8 of the memorandum in Petitioner's Appendix is inaccurate. The correct language is as follows:

{¶8} Defendant also suggests appellate counsel should have raised on appeal the state's failure to produce defendant's post-arrest comments to Detective Felkner. Although defense counsel on page 78 of the trial transcript alluded to a "purported statement from our clients that we had not gotten until today," we are unable to determine the nature of the statement or its content. As a result, we lack a basis to conclude, as defendant argues, that the state's failure to produce the "statement" earlier in the proceedings prejudiced him or probably would have resulted in a different outcome at trial by providing evidence that defendant legitimately brandished a weapon. To the contrary, defendant's own testimony suggested he lacked a legal basis for employing a deadly weapon in the circumstances leading to the charge against him, as defendant acted on his own assumptions about the nature of the danger the circumstances posed.

APPENDIX B

JURY INSTRUCTION REGARDING THE CASTLE DOCTRINE UNDER OHIO REVISED CODE § 2901.05(B)

Self-defense in a residence or vehicle. Defendant claims he acted in self-defense or in defense of another. While the burden of proof is always on the defendant to prove self-defense, the law creates a presumption that the person acted in self-defense in certain circumstances. This means that if you find by a preponderance of the evidence that the following factors are true, you must find that the defendant acted in self-defense and must enter a verdict of not guilty.

A. The defendant used defensive force.

B. That the person against whom the defensive force was used was in the process of unlawfully and without privilege to do so, entering the residence and/or vehicle occupied by the defendant.

Residence means a dwelling in which the person resides either temporarily or permanently or is visiting as a guest.

Dwelling means a building or conveyance of any kind that has a roof over it and is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile, and includes an attached porch and a tent.

Vehicle means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

Privilege means any immunity, license, or right conferred by law, bestowed by expressed or implied grant, arising out of a status, position, office, relationship, or growing out of necessity.

This presumption is a rebuttable presumption. If the State presents evidence that causes you to believe by a preponderance of the evidence that either of these factors is not true, then this presumption does not apply.

Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed.

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
JUN 4 - 2011
OFFICE OF THE CLERK

No. 10-1313

In The
Supreme Court of the United States

JOHN R. CLELLAN,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari

PETITIONER'S REPLY BRIEF

JOAN KATHLEEN CLELLAN
Counsel of Record
P. O. Box 492
Galloway, Ohio 43119
(614) 561-8657
E-MAIL: jm.dandy60@yahoo.com

Counsel for Petitioner

June 3, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES CITED v

QUESTIONS PRESENTED.....i - iii

CONSTITUTIONAL & STATUTORY PROVISIONS.....vi

PETITIONER'S REPLY BRIEF 1

First Question Presented:

I. Where an appellate court reviews an application for Reopening an Appeal based upon a claim of ineffective assistance of appellate counsel, that court may not find failure to preserve and produce applicant's requested dash camera video-taped "confession' after arrest and position of attacker's car in road, potentially useful evidence and not materially exculpatory when such decision conflicts with established appellate caselaw.....1

Second Question Presented:

II. Where an appellate court denies an application for Reopening an Appeal, as above-stated, that court may not find failure to produce in discovery a deputy's statement presented second day of trial and entered into evidence by trial judge without defense counsel's objection, not prejudicial to Petitioner or to the outcome of his case, without examination of that officer's statement and reliance on the transcribed description of such evidence alone.....4

Third Question Presented:

III. Where a "test case" for the "Castle Doctrine" is presented to a jury along with an improper proposed jury instruction regarding Ohio Revised Code Section 2901.05 that was further improperly modified by the trial court, the reviewing court may not find that such jury instructions did not deprive Petitioner of a fair trial and due process rights.....7

Fourth Question Presented:

IV. Where an attacker had admitted to a 911 dispatcher that he went up to Petitioner who was lawfully in his own vehicle and began threatening Petitioner, the appellate court may not, both on Appeal and on Application for Reopening, rely on its own interpretation of what

"in the process" entails under Ohio Revised Code Section 2901.05, adding burdens upon the Petitioner not set forth in the statute.....9

Fifth Question Presented:

V. The Ohio Supreme Court ought not to have declined jurisdiction to hear a test case under the "Castle Doctrine" which, as interpreted by both trial and appellate courts, denies Petitioner the inalienable constitutional right of self defense as set forth in recent decisions of the Supreme Court of the United States.....9

Sixth Question Presented:

VI. Where Petitioner and his co-defendant were tried together both claiming self defense and /or defense of another pursuant to the "Castle Doctrine," there was unequal protection of Petitioner whose co-defendant coming to his rescue was found not guilty and the Ohio Supreme Court should not have declined jurisdiction to hear this matter.....13

CONCLUSION 15

APPENDIX

Appendix A: Transcript excerpt, comment, and affidavit.....1

Appendix B: Opinion and Entry of the Ohio Tenth District Court of Appeals on Application for

Reopening, Denial of rehearing, State v. Clellan (February 8, 2011), Franklin App. No. 09 AP – 1043, unpublished.....3

Appendix C: Jury Instructions Excerpts.....11

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

Brady v. Maryland, 373 U.S. 83 (1963) .....3 & 4.

California v. Trombetta, 467 U.S. 479 (1984) ..2

Dunn v. United States, 284 U.S. 390 (1932).....14

Estelle v. McGuire, 502 U.S. 62 (1991).....8

Giglio v. United States, 405 U.S. 150, (1972)....4

Harris v. Rivera, 454 U.S. 339 (1981).....14

Illinois v. Fisher, 540 U.S. 547 (2004) 3

United States v. Dotterweich, 320 U.S. 277, (1943).....14

CONSTITUTIONAL AND STATUTORY PROVISIONS PAGE

U.S. Const. amend. XIV 15

28 U. S.C. Section 1257.....1

O.R.C. Section 2901.05 .....7 & 8

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. Section 1257.

PETITIONER'S REPLY BRIEF

I. **Where an appellate court reviews an Application for Reopening an appeal based upon a claim of ineffective assistance of appellate counsel, that Court may not find failure to preserve and produce Petitioner's requested dash camera-videoed alleged "confession" of Petitioner after arrest and disputed position of attacker's car in roadway as only potentially useful evidence and not materially exculpatory when such decision conflicts with established appellate case law.**

Respondent states the lost/destroyed police cruiser video may have recorded events at the scene after the "crime." (RBr. Pg. 8, P 1). However, Officer Felkner who triggered the camera admitted his questioning of Petitioner and his responses were recorded by the camera. (Transcript p. at 143 &144). The intruder's vehicle position in critical issue at trial, but now admitted by Respondent, was also recorded. The camera would also show Petitioner's request to investigate tracks from his vehicle, attacker's footprints on his property, preservation of the scene, and attackers standing at Litchfield's car smoking cigarettes, talking/laughing when the officers arrived. Petitioner's attorney inquired if the video could have contained exonerating evidence. The reply was, "It could have." This question and

response were either deliberately or inadvertently omitted from trial transcription. (see Appendix A - Transcript excerpt/comment/affidavit). Even the deputy's testimony regarding Petitioner's supposed statement on camera does not align with the deputy's professed written "report" of what Petitioner purportedly said. Felkner testified Petitioner told him "he had gotten into an argument with Litchfield" (Transcript p. at 140, lines 16 & 17), and "admitted there were no threats made by Litchfield (Transcript p. at 142, lines 2 & 3)." None of that appears in the "report." Not providing the requested video evidence permitted the deputy even greater liberties in testimony regarding what Petitioner stated in the cruiser and even the appellate court found the officer's representations of Petitioner's "admissions" to be extremely damaging. Such evidence is materially exculpatory, because it possessed both "exculpatory value apparent before the evidence was destroyed, (why trigger the camera to record Petitioner's "confession," (Transcript p. at 143 & 144) then not preserve the tape?) and was "of such a nature that defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984). Petitioner's statements on camera would necessarily carry more weight and credibility being made on the scene and proximate in time to the event, rather than Petitioner's trial testimony nine months later - juxtaposed with an officer's contradictory statements regarding the purported taped "confession." It was not necessary for Petitioner to show bad faith in denying access to the camera evidence, as it was a violation of due process

to withhold such evidence for whatever reason. Illinois v. Fisher, 540 U.S. 544, 547 (2004), citing Brady v. Maryland, 373 U.S. 83 (1963). Any evidence procured by the State should be available to defense whether or not the State intends to use it. Who can know what impact such evidence would have had? This "confession" was not some irrelevant tangential utterance about some unrelated point or occurrence. The deputy's testimony should have been disallowed for failure to provide discovery. He only testified regarding what was supposedly said by Petitioner. There was nothing he witnessed, not being there at the time. What Respondent has asserted regarding video evidence (that it only "recorded events after the "crime" had been committed) could also be said regarding the deputy's testimony, yet the appellate court and Respondent repeatedly asserted the deputy's trial statements were extremely damaging. The deputy testified Petitioner "admitted there were no threats made by Litchfield." (Transcript p. at 142, lines 2 & 3). Petitioner denied making such a statement and the deputy's "report" did not mention it. Miranda warnings do not include an admonition "anything I say you said will be used against you in a court of law." The Petitioner's recorded statement should stand alone to relay the actual statements upon arrest, not the deputy's interpretation nine months later. Petitioner asserts the deputy's omissions of Petitioner's statements regarding Litchfield's threatening actions were more important. Only the video would have delivered crucial parts of the interview to the jury. The deputy's testimony regarding Petitioner's thoughts about Litchfield's

abilities or inabilities is irrelevant under the Castle Doctrine, and calls for infinite speculation.

II. **Where an appellate court denies an Application for Reopening an appeal as stated above, that Court may not find failure to produce in discovery a deputy's statement presented the second day of trial and entered into evidence by the trial judge without objection from Petitioner's counsel not prejudicial to him or to the outcome of his case, without examination of that officer's statement/exhibit and relying only on the transcribed description of such evidence.**

Certain types of evidence must be disclosed by the prosecution in order to safeguard a defendant's due process rights. Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence possibly used to impeach government witnesses is a critical form of such information a prosecutor must divulge. Giglio v. United States, 405 U.S. 150, 154-55 (1972). The prosecutor failed to provide defense the "report" he held. (Transcript Pg. 78, line 2). The prosecutor brought to attention its existence late on the second day of trial, and not after trial only because he wished to refer to it that day to confuse the jury regarding what Petitioner had related to the deputy who created the "report." Contrary to Respondent's and appellate court's incomprehensible assertion the "nature of the statement and its content was unknown" to them, the transcript is replete with supporting evidence as to what this previously undisclosed "statement of Clellan" or "report" was.

What other "statements" of Petitioner would the prosecution be holding? The prosecutor said it was a "report," and there was no other report of Petitioner's purported statements. The entire line of prosecution's questioning of the deputy relates to that "report." (Transcript Pg. 135 - 142). Counsel, throughout cross-examination, asks him if the statements attributed to Petitioner on the stand are in his "report." (Transcript p. at 142 – 150). He is asked, "Your report says - - is basically ten words or less on what you talked to Mr. Clellan about, am I right? Do you see your report?" He states he does not "have it (report) in front of (him)." (Transcript p. at 145, lines 17 - 20). The deputy is questioned, "When did you write this report?" The officer replies, "The day of the incident." (Transcript p. at 146, lines 21 – 24). Regarding the report, the deputy states he "had to have the report written out before taking [Clellan] to jail. The jail will not accept inmates without the reports." (Transcript p. at 147, lines 3 – 12). Felkner says he believes he "wrote [report] right there in the vehicle." When questioned whether Clellan was shown the "report" or asked to verify it as an accurate accounting of what he said, the officer stated, "No." When asked whether Clellan was asked to initial the "report," the deputy answered, "No." (Transcript p. at 147, lines 15 –23). At the end of deputy's testimony, the Court asks Petitioner's counsel, "Before we proceed, Counsel, did we mark the sheriff's report? I don't know if you intended on moving it for admission, but just for purposes of the record." Petitioner's counsel replies, "No. Should we, your Honor? We can if you want to." The Court responds, "Please." The "report" is

marked as Defendants' Exhibit F. (Transcript p. at 154, lines 4 – 13). There is absolutely no doubt as to what the purloined "report" was, although it is completely baffling how this evidence came to be defense's exhibit. Petitioner's counselor appeared confused regarding marking the exhibit, so much so the Court essentially demanded and moved for the report to be marked as defense exhibit F. Days later, the prosecutor moved to admit exhibit F, the sheriff's "report." During admission of marked exhibits, all items were identified by the Court except Defense Exhibit F, remaining unidentified to defense counsel and was passed through as evidence without his comment or acknowledgement. Petitioner's counselor appeared oblivious to what transpired regarding this extremely critical and highly suspect "report." (Transcript p. at 277 – 280).

The failure of prosecution to timely provide the "report" to defense was very prejudicial to Petitioner on many levels, including his ability to make an informed plea or prepare. The provenience of this document could not be ascertained due to prosecution's ambush delivery. How could Petitioner verify this "report" was the one logged in the prison intake system the night of his arrest? No opportunity was given to investigate source or chain of evidence regarding this "report." The document could easily have been altered or fabricated as the prosecution refused to divulge its existence at the outset when chances for such would be far less. The authenticity of the "report" falls into greater question when one asks, "Why prosecution did not enter this into evidence as state's exhibit and

why the Court insisted defense counsel mark it as Defense Exhibit F?" Did the "report" even exist prior to the second day of trial? Petitioner was greatly harmed by defense counsel admitting this "report" - it contradicted Petitioner's statements. No time was allowed counsel to confer with his client regarding the document, its significance or probative value. As far as counsel's non-objection to the document being trial strategy, this is unreasonable given counsel gave no real appearance of even understanding what it contained or its ultimate significance. Defense was out-gunned, allowing himself to be tricked and bullied into marking and entering it into evidence as a defense exhibit!

III. **Where a "test case" for the "Castle Doctrine" is presented to a jury along with an improper Proposed Jury Instruction regarding Ohio Revised Code Section 2901.05 (see Appendix H), that was further improperly modified by the trial court, the reviewing court may not find such confusing jury instructions did not deprive Petitioner of a fair trial and due process rights.**

Respondent acquiesces to a key point in argument regarding the content of jury instructions at trial: "While the burden of proof is always on the defendant to prove self-defense..." (R.App. B, Jury Instruction Regarding The Castle Doctrine). The definition of <u>always</u> is: "on every occasion; at every time; ceaselessly; continuously; forever" (American Heritage Dictionary of the English Language, (1980) Pg. 40). This prefatory introduction begs the question: "If the burden of proof is <u>always</u> on the

defendant, how can a presumption of self-defense as mandated in the statute exist?" This instruction sets forth a premise confounding logic and any attentive jury encountering it. Under the Castle Doctrine the jury instruction's initial function is to present and underline the presumption of self-defense in the jury's mind, not merely semantically practicable in some alternate universe, but here only as a mutually exclusive scenario of impossibility. By the erroneous insertion of this single phrase, Petitioner's ability to avail himself of self-defense under the Castle Doctrine was disintegrated. There is at the least a reasonable probability the jury applied the instruction in a way violating the Constitution, Estelle v. McGuire, 502 U.S. 62, 72 (1991), rising to the level of a constitutional violation in that it "so infected the entire trial that the resulting conviction violates due process," Id. at 72, and Petitioner was denied the inalienable constitutional right of self-defense. The jury instructions were so confusing they deprived Petitioner of both the presumption of the Castle Doctrine and the affirmative defense of self-defense, effectively eradicating any rights under the law. At no time was Petitioner said to be the aggressor and all agreed he used defensive force. (App. Decision of State v. Clellan (August 17, 2010), 10th Dist. No. 09 AP-1043, P. 20). Litchfield admitted he "went up to" Clellan, stating, "If you're gonna run your mouth . . ." (Transcript p. at 96, lines 2 & 3).

The jury's consideration of Clellan's defense was tainted by court's incomplete and erroneous jury instruction, confusing the 2901.05 inquiry. The

proper result was for the conviction to be vacated and a new trial held.

IV. **Where an attacker had admitted to a 911 dispatcher that he went up to Petitioner who was lawfully in his own vehicle and began threatening Petitioner, the Appellate Court, both on appeal and on Application for Reopening, may not rely on its own interpretation of what "in the process" entails, adding onerous burdens on the defense not intended by the "Castle Doctrine."**

Respondent states no important question of federal law is presented by Petitioner and federal courts may not review state-court interpretations of state law. Respondent contends that federal court is limited to deciding whether a conviction violated the United States Constitution, laws, or treaties. However, where self-defense is denied by a state court's interpretations of law, as in this case, the Supreme Court of the United States has the utmost duty to intervene in maintaining the constitutional rights of that state's citizens.

V. **The Supreme Court of Ohio should not have declined jurisdiction to hear a "test case" under Ohio's new "Castle Doctrine" which as interpreted by the Trial and Appellate Courts denies Petitioner the constitutional right of self-defense.**

Respondent asserts Ohio laws did not deny Petitioner's rights and he disregards Ohio's self-defense statutes. (RBr. Pg. 22). Petitioner's argument is not self-defense statutes do not exist in the State of Ohio, but that trial, appellate and supreme courts of Ohio have denied Petitioner the constitutional right of self-defense through their apparent unwillingness to properly instruct a jury on self-defense under Ohio's statutes or uphold Petitioner's rights under those laws upon review. Respondent maintains "the jury was instructed on self-defense as a presumption and as an affirmative defense." However, the instructions removed any presumption favorable to defense, placed new and onerous burdens upon them and presented an amorphous construct that was a legal morass. Respondent further argues, "the jury did not find Petitioner's actions constituted self-defense." (RBr. Pg. 22). It is no small surprise Petitioner was found guilty given the Alice-in-Wonderland-writing style adopted by those who cobbled together their instructions formulating a maze ending at "guilty," with no alternative avenues. The following paragraph appeared in the jury instructions more than a page prior to any discussion of self-defense:

> "The defendants are each charged with a count of aggravated menacing. Before you can find defendant guilty, you must find beyond a reasonable doubt that on or about the 4th day of February, 2009, and in Franklin County, Ohio, the defendant knowingly caused another; to-wit, Robert Litchfield, to believe that

> John Clellan would cause serious physical harm to said other; to-wit, John Clellan pointed a handgun at Mr. Litchfield and stated, "I will kill your ass." (Transcript p. at 310, lines 14 – 22).

Since Petitioner never denied pointing a gun and telling Litchfield he would be shot if continuing his actions, the jury at this juncture, perforce must deem Petitioner "guilty." Any discussion of self-defense under the Castle Doctrine was tainted with the incorrect phrase, "While the burden of proof is always on the defendant to prove self-defense . . ." (Transcript p. at 312, lines 3 & 4). Insertion of this preface "always," precludes shifting the burden of proof to the prosecution as is required by law, even in light of the fact Litchfield testified he exited his own vehicle <u>angry</u> (Transcript p. at 100, lines 8 – 14 and p. at 105, lines 18 – 24), "<u>had (his) arms up</u>, [and] said, "What the f _ _ _ is your problem?" (Transcript p. at 40, line 4). His companion testified she did not know why Litchfield even got out of his car at that time and did not leave his vehicle for four or more minutes after her first confrontation with Petitioner and no threats were made prior to Litchfield entering the scene. Litchfield, in fact, testified Petitioner was afraid of him. (Transcript p. at 103, lines 20 –23). Even Litchfield's admission against interest/excited utterance to the 911 dispatcher, "I went <u>up to him</u> and said, '<u>If you're gonna run your mouth</u> . . .' you know, whatever[,]" (Transcript p. at 51, lines 5 & 6 and p. at 96, lines 2 & 3), that plainly proved him the aggressor and left no doubt he approached Clellan

and made threats to him as Petitioner occupied his own vehicle, (Transcript p. at 52, line 1), was insufficient to overcome the damage done to defense by piece- meal, conflicting interpretations of the "Castle Doctrine" in the jury instructions.

Further, Ohio's old self-defense law was butchered into bloody stumps spread in and around this castrated new law. Appearing suddenly in the instructions without bridge or explanation regarding what the jury was to do with it, were the words:

> "Self-defense. Defendant claims to have acted in self-defense. To establish that he or she was justified in acting in using **force not likely to cause death or great bodily harm**, the defendant must *prove by the greater weight of the* evidence that he or she was not at fault in creating the situation giving rise to the events that led to the charges of aggravated menacing . . ." (Transcript p. at 313, lines17 – 23, **emphasis added**).

The jury had to conclude Petitioner used force greater than that **not** likely to cause death or great bodily harm and had no alternative but to find him guilty. Nowhere in the instructions did there appear any provision regarding the fact Petitioner had no duty to retreat from his attacker. Although the Castle Doctrine does not present a duty to retreat, an appellate judge even stated Petitioner could have "just driven away." (State v. Clellan, August 18, 2010, 10th Dist. No. 09 AP-1043, 2010-Ohio-3841). No

weight was given the fact Petitioner had no duty to retreat nor to circumstances in which he found himself in a truck in deep snow stuck on his own property under attack by a stranger. Hide-bound subscribers to the duty to retreat rule fail to grasp the reason it was abolished in Ohio self-defense law or the need to allow the use of any force let alone deadly force. Monday morning quarterbacks can say, " Just run like hell!" The Castle Doctrine and Ohio's old self-defense law nullify each other when mixed. The misstated Castle Doctrine is ineffective, and is no aid to a jury in determining what to do once the presumption has obviously been established if there is no attempt to make the law understandable and guide their way. The people of Ohio have spoken in passing the Castle Doctrine. Ohioans want strong self-defense laws. The trial judge and the prosecution in this matter thwart the will of the people. The jury did not "lose its way," but was forced off the path by a prosecutorial lynch mob. So prejudiced was the Petitioner at trial this case should be remanded for retrial where the jury's deliberations will not be tainted by jury instructions such as those previously purporting to be the law in Ohio. Petitioner respectfully requests the Supreme Court of the United States to intervene on his behalf and asserts that it is within the jurisdiction of the United States Supreme Court to uphold the constitutional and inalienable right of self-defense.

VI. **Where Petitioner and his co-defendant were tried together, both claiming self-defense/or defense of another based on the new "Castle Doctrine," there was unequal protection of**

Petitioner whose co-defendant (who came to his rescue) was found not guilty by the same jury and the Ohio Supreme Court should not have declined jurisdiction to hear this matter.

Respondent asserts "inconsistent verdicts are not subject to reversal merely because they are inconsistent." Dunn v. United States, 284 U.S. 390, 393 (1932); United States v. Dotterweich, 320 U.S. 277, 279 (1943); Harris v. Rivera, 454 U.S. 345, 348. Respondent states, "verdicts that treat co-defendants in a joint trial inconsistently are not a sufficient reason for setting the verdict aside." Harris v. Rivera, 454 U.S. at 345, citing Dotterweich, 320 U.S. at 279. Citing Harris v. Rivera, 454 U.S. at 348, Respondent says "[e]ven assuming a co-defendant's acquittal is logically inconsistent with a defendant's conviction, a defendant, who is found guilty beyond a reasonable doubt after a fair trial, has no constitutional ground to complain that his co-defendant was acquitted." Petitioner contends in a case such as his wherein the co-defendant claimed the same defense and the findings are **legally** dependent on each other the acquittal of his co-defendant is **legally** inconsistent, not just logically so. Self-defense presents a unique set of dynamics that must be adhered to for many reasons. Even under the Castle Doctrine, self-defense must correlate between co-defendants, especially in order for one "coming to the aid" of another to be deemed not guilty. Either the jury was inextricably confused or was purposely misled to find one person guilty and the other not. Other types of cases do not have this integral and cohesive mechanism of interdependency.

It must be said the manifest weight of evidence showed the co-defendant came to Petitioner's rescue, availed herself of the Castle Doctrine's defenses and won. If Petitioner were engaging in an unlawful act when his co-defendant came to his aid, how could his co-defendant be found innocent when the two defenses must operate in tandem? No one in a self-defense case may come to the aid of another who is committing a crime. Why were these defenses set up to correlate under the law if they in fact do not? The outcome of this case is altogether disturbing and unsettling for any logical or legal thinking person. Such arbitrary results prove Petitioner was denied constitutional rights to equal protection under the Fourteenth Amendment of the United States Constitution.

CONCLUSION

Petitioner John R. Clellan implores this Court will please grant his petition for writ of certiorari.

Respectfully submitted,

Joan Kathleen Clellan
Ohio Registration No. 0022126
P. O. Box 492
Galloway, Ohio 43119
(614) 561-8657
Counsel of Record
Counsel for Petitioner Clellan

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN 4 - 2011
OFFICE OF THE CLERK

No. 10-1313

In The
Supreme Court of the United States

JOHN R. CLELLAN,
Petitioner,

v.

STATE OF OHIO,
Respondent.

APPENDIX

FOR PETITIONER'S REPLY BRIEF

JOAN KATHLEEN CLELLAN
Counsel of Record
P. O. Box 492
Galloway, Ohio 43119
(614) 561-8657
E-MAIL: jim.dandy60@yahoo.com

Counsel for Petitioner

June 3, 2011

Library of Congress
Law Library

{A}

CROSS-EXAMINATION OF DEPUTY FELKNER

End of examination by Mr. Sherman:
Transcript at p. 150, lines 14 – 22:

Q. And we have a video, and we don't have the video, and we have no other documentation?
A. Again, the video is not something I control. That's out of my hand. I do not have access to the video.
Q. It's not your job to preserve and maintain evidence?
A. It's not part of my duty to retract the video from cruisers, no.
Q. All right. **Was there anything on it that might have exonerated my client?**
A. **It's possible.**
Q. **Thank you, Deputy. That's all I have, your Honor.**

COMMENT

The sequence of testimony that has been emboldened above does not appear in the filed transcript of proceedings. This passage was either deliberately or accidentally omitted when transcribed. Nowhere else in the transcript does Attorney Sherman conclude questioning without either thanking the witness or addressing the judge. Court reporters in Ohio are not required to be licensed or certified and the Court is not prone to release any recorded materials for verification of transcripts. Affidavits from jury members, participants and/or observers in the courtroom may be provided regarding this matter.

{B} *

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 09AP-1043
Plaintiff-Appellee,	:	(MC No. 2009 CRB 2626)
	:	(Regular Calendar)
	:	
v	:	
	:	
John Clellan,	:	
	:	
Defendant-Appellant.		

MEMORANDUM DECISION
Rendered on February 8, 2011

Richard C. Pfeiffer, Jr., City Attorney, Lara N. Baker, City Prosecutor, Melanie R. Tobias and Orly Ahroni, for appellee.

The Vargas Law Firm, Co. L.P.A., and Edwin J. Vargas; Nicholas A. Panagopoulos II, LLC, and Nicholas A. Panagopoulos II, for appellant.

ON APPLICATION FOR REOPENING

BRYANT, P. J.

{P 1} Pursuant to App.R. 26(B), defendant-appellant, John Clellan, filed on November 15, 2010 an application for reopening of our decision

in State v. Clellan, 10th Dist. No. 09AP-1043, 2010-Ohio-3841, that affirmed his conviction for one count of aggravated menacing in violation of R.C. 2903.21. Defendant premises his application on the failure of appellate counsel to raise two issues which, defendant asserts, create a "reasonable probability the [his] sentence would have been overturned." (Application, 3.) Contrary to defendant's assertions, his application fails to set forth issues which, if raised, would have created a reasonable probability of a different result on appeal. Accordingly, we deny defendant's application.

{P 2} App.R. 26(B) permits applications for reopening an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. An application for reopening must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation[ ]" App.R. 26(B)(2)(c). The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{P 3} In order to prevail, defendant must establish "a colorable claim" of ineffective assistance of appellate counsel. State v. Lee, 10th Dist. No. 06AP-226, 2007-Ohio-1594, P2, citing

State v. Sanders (1996), 75 Ohio St3d 607. The standard in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, is applied to determine whether the applicant has established ineffective assistance of counsel. Lee, supra. Strickland requires defendant to demonstrate counsel was deficient for failing to raise the issue he now presents and that defendant had a reasonable probability of success had that issue been presented on appeal. Lee, citing State v. Timmons (Jan. 19, 2006), 10th Dist. No. 04AP-840 (Memorandum Decision).

{P 4} Defendant points to two issues he contends appellate counsel should have raised as ineffective assistance of trial counsel:

> A. Trial counsel failed to object to multiple Crim.R. 16 discovery violations involving: 1) the failure to preserve and produce potentially exculpatory dash camera evidence of Clellan's interrogation after arrest; and 2) the introduction of statements and related testimony by Deputy Felkner despite not being produced to the defense until the second day of trial.
>
> B. Trial counsel submitted an improper proposed jury instruction regarding R.C. Section 2901.05 to the trial court and also failed to object to the trial court's improper

modification of said jury instruction regarding Ohio's "Castle Doctrine" – R.C. Section 2901.05.

A. Discovery Issues

{P 5} Defendant first asserts his appellate counsel should have raised as error trial counsel's not objecting to the state's failure to produce a lost or destroyed police cruiser video and defendant's post-arrest comments to Deputy Felkner.

{P 6} This court in State v. Glunt, 10th Dist. No. 09AP-962, 2010-Ohio-3024, addressed the pertinent law governing lost or destroyed evidence. Courts initially must distinguish "between evidence that is materially exculpatory and that which is only potentially useful." Id. at P9. If the evidence is materially exculpatory, "its suppression violates a defendant's due process rights, and requires dismissal of the charge." Id. By contrast, "if the evidence is only potentially useful, the defendant must show bad faith on the part of the state in order to show that the defendant's due process rights have been violated." Id.

{P 7} Evidence is materially exculpatory if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at P15. Because the video did not capture the activity giving rise to the aggravated menacing charge,

but only to post-incident police activity on arriving at the scene, it does not address the substance of the charge other than through comments of witnesses who were available for trial. The video thus is only potentially useful evidence. State v. Geeslin, 116 Ohio St3d 252, 2007-Ohio_5239, P12 – 13. Accordingly, to support a due process violation, defendant must show bad faith on the state's part. Id at P14. Defendant does not even suggest bad faith. Accordingly, appellate counsel was not ineffective in failing to raise on appeal the lost or destroyed video, as the argument lacks merit.

{P 8} Defendant also suggests appellate counsel should have raised on appeal the state's failure to produce defendant's post-arrest comments to Detective Felkner. Although defense counsel on page 78 of the trial transcript alluded to a "purported statement from our clients that we had not gotten until today," we are unable to conclude, as defendant argues, that the state's failure to produce the "statement" earlier in the proceedings prejudiced him or probably would have resulted in a different outcome at trial by providing evidence that defendant legitimately brandished a weapon. To the contrary, defendant's own testimony suggested he lacked a legal basis for employing a deadly weapon in the circumstances leading to the charge against him, as defendant acted on his own assumption about the nature of the danger the circumstances posed.

B. Jury Instruction

{P 9} Defendant next asserts his appellate counsel should have raised the ineffectiveness of trial counsel in the jury instructions given concerning what generally is referred to as the "Castle Doctrine," embodied in R.C. 2901.05. Defendant contends counsel should have included in his proposed instruction language comparable to that contained in R.C. 2901.05(B)(2)(a) and (b). Both apply to circumstances where the presumption of self-defense in R.C. 2901.05 is rebutted: when the person against whom force is used has a right to be in the home or vehicle and when the person who uses the force is unlawfully in the house or vehicle.

{P 10} Defendant's contentions are unpersuasive. Initially, neither provision defendant points to is supported in the evidence. The trial court is not required to instruct on matters the evidence does not implicate. State v. Scott (1986), 26 Ohio St.3d 92, 101. In addition, any presumption of self-defense was eliminated on the jury's believing the person against whom defendant used force did not attempt to enter defendant's vehicle, a proposition the deputy sheriff testified defendant ultimately admitted was true. As a result, defendant's argument concerning jury instructions fails to support his contention that the additional instructions, with reasonable probability, would have produced a different outcome at trial.

{P 11} Because defendant fails to present a basis for reopening his appeal, we deny his application for reopening.

Application for reopening denied.

KLATT and FRENCH, JJ., concur.

{ B-7 }

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,

: No. 09AP-1043

Plaintiff-Appellee, (MC No. 2009 CRB 2626)

v. : (Regular Calendar)

John Clellan,

:

Defendant-Appellant.

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this Court rendered herein on February 8, 2011, it is the order of this court that the application for reopening, filed on November 15, 2010, is denied. Costs assessed to defendant.

BRYANT, P.J., KLATT & FRENCH, JJ.

By ss//
Judge Peggy Bryant

***NOTE: THE ATTORNEY OF RECORD NEVER RECEIVED NOTIFICATION OF OR A COPY OF THIS DECISION, ALLOWING THE TIME OF APPEAL TO RUN**

{C}

JURY INSTRUCTIONS EXCERPTS

. . .

The defendants are each charged with a count of aggravated menacing. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 4th day of February, 2009, and in Franklin County, Ohio, the defendant knowingly caused another; to-wit, Robert Litchfield, to believe that John Clellan would cause serious physical harm to said other; to-wit, John Clellan pointed a handgun at Mr. Litchfield and stated, "I will kill your ass." (Transcript p. at 310, lines 14 – 22).

. . .

SELF-DEFENSE IN A RESIDENCE OR VEHICLE

" The defendant claims he acted in self-defense or in defense of another. While the burden of proof is always on the defendant to prove self-defense, the law creates a presumption that a person acted in self-defense in certain circumstances. This means that if you find by a preponderances (sic) of the evidence that the following factors are true, you must find that the defendant acted in self-defense and must enter a verdict of acquittal.

(A). The defendant used defensive force;

(B). That the person against whom the defensive force was used was in the process of unlawfully and

without privilege to do so, entering the residence and/or vehicle occupied by the defendant;

(C). 'vehicle' means a conveyance of any kind, whether or not motorized, which is designed to transport people or property;

(D). 'privilege' means any immunity, license or right conferred by law, bestowed by expressed or implied grant, arising out of a status, position, office, relationship, or growing out of necessity." (Transcript p. at 312 & 313, lines 1 – 5).

. . .

Self-defense. Defendant claims to have acted in self-defense. To establish that he or she was justified in acting in using force not likely to cause death or great bodily harm, the defendant must prove by the greater weight of the evidence that he or she was not at fault in creating the situation giving rise to the events that led to the charges of aggravated menacing; (Transcript p. at 313, lines 17 –23).